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A CENTURY OF CORRELATIVE RIGHTS  
OIL & GAS, & REGULATION  
OF OIL IMPORTS

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A CENTURY OF COOPERATIVE RIGHTS--OIL & GAS

&

REGULATION OF OIL IMPORTS

by

R. O. KELLAM, LCDR USN  
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A THESIS

submitted to the Graduate Faculty of the School  
of Law, Southern Methodist University in partial  
fulfillment of the requirements for the degree of

MASTER OF LAWS IN OIL AND GAS

in the Graduate School of Law, Southern Methodist  
University

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A CENTURY OF CORRELATIVE RIGHTS--OIL & GAS

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A CENTURY OF CORRELATIVE RIGHTS  
OIL & GAS

INTRODUCTION	1.
NATURE OF THE RIGHTS INVOLVED	2.
Natural rights as "correlative".	8.
BACKGROUND OF THE RIGHTS INVOLVED	10.
RIGHTS PROTECTED BEFORE OHIO OIL CO. V. INDIANA	18.
No waste, no boundary crowding.	20.
Boundary crowding.	21.
Injury as a weapon in bargaining.	22.
Judicial Approval of Economic Waste.	24.
RIGHTS PROTECTED--OHIO OIL CO. V. INDIANA AND AFTER	26.
Rights protected.	26.
Common Lessee cases.	35.
Tortious invasions of the rights protected.	38.
RIGHTS AS SUBJECTS OF LEGISLATIVE POLICY AND DEFINITION	44.
CORRELATIVE RIGHTS VERSUS CONSERVATION	53.
THE FUTURE	58.
CONCLUSIONS	62.



## Introduction

The natural mechanics of underground reservoirs, in which oil and gas are trapped, operate without regard to the man-made ownership boundaries above. Oil and gas "migrate" to the lower pressure area when the seal of the reservoir is broken. Thus, the natural forces at work do not guarantee an overlying owner that the oil and gas will remain in place to await his pleasure of taking unless, of course, the entire reservoir lies below the owner's tract. A landowner is seldom so fortunate. If, as is usual, this common source of supply is overlain by many owners, certain jural relationships are thrust upon them all, each to the other, relative to the exploitation of the reservoir.

This article is concerned with the nature and background of the legal relationships involved, their evolution from the rule of capture, and their manifestations before and after the key case of Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).



## Nature of the Rights Involved

Since this entire discourse is directed toward the exploration of the place of correlative rights in oil and gas law, every portion hereof is intended to foster that purpose. Some precision of definition may, however, serve to establish some recognizable frames of reference within which analysis may be contained.

Lawyers and laymen alike bandy the term "right" or "rights" around with assurance and proprietorship. We are said to have "civil rights", "property rights", "constitutional rights", etc. Rights are variously described as "inalienable", "natural", "fundamental", "conditional", "Godgiven", etc. With respect to possessions or a place in line at the playground, children quarrel and cry over them. With more complicated motives, adults fight and commit crimes over them. They are promised and praised by politicians---lauded and litigated by lawyers.

Such an exercise in semantics is, I trust, sufficient to demonstrate that the varied meanings and modifications of words muddies the waters of perception and analysis.

If one has a "right" he is likely to think of it as a prevailing and boundless thing which cannot be properly overturned. If it is violated, some positive action of restitution is in order. It is antonymous with "unjust", "wrongful", and "incorrect". It seems to be human nature that the "right" attains vigor in direct proportion to the greed, selfishness, or idealism involved. Difficulty comes when these "rights" clash.





For example: A, a newspaperman, publishes a story deprecating B. A is concerned about his "right" of freedom of the press. B counters with his "right" to enjoy his good name. For another example: C, a landowner, drills an oil well on his property. He has no attractive market for the gas and finds it to his immediate economic benefit to allow the gas to escape. This injures the gas field of D, an adjoining landowner. C is content with his "right" to capture and reduce the oil and gas to his possession and to dispose of it as he pleases. D is impressed with his "right" to the continued and full enjoyment of the items of value underlying the surface of his property.

It is obvious that all the claimed "rights" in the foregoing examples cannot prevail. So, by legislative fiat or judicial interpretation, the cases of A v. B and C v. D have to eventually be resolved. Some are going to learn that their "rights" aren't rights after all, or that they aren't as potent as they believed. All will perhaps discover that their "rights" are not bound by the same peripheral lines as they anticipated.

Writers in jurisprudence have long recognized the value of classification of jural relationships in order to assist in their clarification. Hohfeld sought to do this in his classification of jural correlatives and jural opposites.<sup>1</sup>

1. Hohfeld, Fundamental legal Conceptions as applied in Judicial Reasoning, 63-64 (1923), ".....these eight conceptions, rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities, seem to be what may be called 'the lowest common denominators of the law'". For an explanatory and generally non-critical treatment of Hohfeld's analysis, see Corbin, Legal Analysis and Terminology, 29 Yale L.J.163 (1919).



He was preceded by Austin who offered an analytical discussion of rights. Although Austin's analysis was fairly scientific, he concluded with a brief definition of a right. It has value<sup>2.</sup> for its simplicity:

"A party has a right, when another or others are bound or obligated by the law, to do or to forbear,<sup>5</sup> towards or in regard of him."

M. Radin in his "A Restatement of Hohfeld"<sup>3</sup> perhaps best summarizes the value of analysis of legal transactions:<sup>4</sup>

"It [Hohfeldian system] professes, however, ---and I think successfully---to be able to reduce any legal transaction, however complicated, to its actual constituent elements or atoms, and its use may save lawyers from the fallacy of accident, the subtlest and most insidious of the pitfalls of the law."

Hohfeld's or any other "analysis" attempts to algebraically describe repeated situations, such as judgments of courts, in such a way that they fall in a pattern. Radin declares that while this may be of some service in the large task of collecting, memorizing or teaching these judgments, it is not<sup>5</sup> in the "much more vitally important task of forecasting them" Be that as it may, the probabilities of forecasting judgments, have long been enhanced by an examination and categorization of precedent.

2.-1 Austin, Lectures on Jurisprudence 366-367 (1875).

3. 51 Harv. L. Rev. 1141 (1938)

4. Id. at 1164.

4. Op. cit. supra note 3, at 1147.



Case law on the definition of correlative rights is not abundant for the reason that judicial declarations relative to them, without benefit of statutes, is scarce. The Alphonzo E. Bell Corporation v. Bell View Oil Syndicate case indicates the reciprocal relation involved in the term "correlative". It was held that the "common and correlative" right to take oil and gas passing through the surface location was common to the extent that every surface owner had a right to reduce the oil and gas to his possession by a well drilled on his own property. Common ownership of the oil and gas was a rejected concept.

Bristor v. Cheatham is of some help in that it distinguished between "reasonable user" and "correlative rights." The former is a term applicable to water law and is sometimes referred to as "correlative rights". However, reasonable user is usually intended to mean the limited taking of water for purposes incident to beneficial enjoyment while under the meaning of correlative rights, the landowner may take only his proportionate share.

The Texas court has set forth a good conservative definition of correlative rights. This definition was adopted from Summers', which is quoted later in this paper. The definition of the Texas court is:

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6. 24 Cal. App. 2d 587, 76 P. 2d 167 (1938).

7. 75 Ariz. 227, 255P. 2d 173, (1953).

8. Elliff v. Texon Drilling, 146 Tex 575, 210 S.W. 2d 558, 562 (1948).





1. Each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by lawful operations conducted on his own land.
2. Each such owner has duties to other owners not to<sup>5</sup> exercise his privileged operations so as to injure the common source of supply.
3. Each such owner has rights that others not exercise their privileges of taking so as to injure the common source of supply.

Summers' definition, from which the above purportedly came<sup>9</sup> as a quotation, goes a little further:

"The term 'correlative rights' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil and gas therefrom by lawful operations conducted on his own land limited, however, by duties to others not to injure the source of supply and by duties not to take an undue proportion of the oil and gas. In addition, of course to this aggregate of legal relations, each landowner has duties to the public not to waste oil and gas."

(Emphasis supplied)

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9. 1 Summers Oil and Gas, 180 (perm. ed. 1954). Summers was careful to describe relationships involved in the terms of Hohfeldian analysis. See the use of "no-right" at page 146: "----discussion will be concerned with the privilege of A, as the owner of Blackacre----to take oil or gas therefrom by operations lawfully conducted----and the correlative no-rights of all other persons, B.C., etc.---that he so take the oil and gas."



It will be noted that the Texas court omitted those portions of Summers' definition relating to (1) the taking of an undue proportion and (2) the landowner's duties to the public not to waste oil and gas. These portions of the Summers definition are not universally accepted. Courts have, in the main, been willing to leave the setting of standards for taking an equitable share and for waste up to the legislatures.

Accepted or not, the "undue proportion" and "waste" part of Summers' definition are firmly established in the milieu of correlative rights.<sup>10</sup> Correlative rights are probably most easily defined and identified by a description of the forbidden conduct (no rights) which invades the interests involved, rather than the rights which are protected. So, correlative rights are often described in terms of "waste", "undue proportion" and the various tortious invasions of properties<sup>11</sup> which are capable of exploiting the common source of supply.

10. Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900): "It follows....that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the rights, to the detriment of others, or by waste by one or more, to the annihilation of the rights of the remainder." Cf. Williams & Meyers, Manual of Oil and Gas Terms, p.50 (1957): "There appear to be two aspects of the doctrine of correlative rights: (1) as a corollary of the rule of capture, each person has a right to produce oil from his well, and (2) a right of the landowner to be protected against damage to a common source of supply and a right to a fair and equitable share of the source of supply." Note further how Summers states, in effect, that A has a duty not to take an undue proportion of the oil and gas, whereas Williams & Meyers state the correlative of this relationship, e.g., that B has a right to a fair and equitable share.
11. For an interesting classification of correlative rights in terms of the forbidden conduct see Kuntz, Correlative Rights in Oil and Gas, 30 Miss. L.J. 1, (1958).



It is probably better to define them in positive terms as reciprocal legal relationships pertaining to the privilege to acquire and the ownership of property. Thus, when values and concepts change, as they do, it is not necessary to resurvey and realign all of the invasions of the rights, but it is only necessary to augment or deplete the scope of the right within the bounds of the new definition. For instance, conservation is the antithesis of waste. If, then, conservation is thought of as anti-waste, and correlative rights are thought of as anti-waste, it is easy to become trapped in the syllogism that conservation and correlative rights are equated. However, there are instances, as will be seen, where conservation and correlative rights clash.

"Natural rights" as "correlative". As final flavor to the definition of correlative rights as a reciprocal relationship wherein each landowner has a privilege to take, coupled with a duty not to take an undue proportion from the common source of supply, it should be recalled that this genus of reciprocity is not otherwise unknown in property law.

For example, the right of lateral support from adjoining landowners is a reciprocal relationship where each adjoining landowner must depend upon the other. It is described by the Minnesota court as a "natural right":<sup>12</sup>

"The right of lateral support is said to be one of  
12. Sime v. Jensen, 213 Minn 476, 7 N.W. 2d 325, 327 (1942).





property, arising from the fact that in a state of nature all land is held together and supported by adjacent lands by operation of the forces of nature. Ownership of land is acquired and held subject to the rights and burdens arising from that situation.

Supported land has a right of lateral support from that which naturally affords it support. Supporting land is burdened with affording such support which it naturally supports." (Emphasis supplied)

Tiffany describes the reciprocal rights of owners and occupants of land as "natural rights" to enjoy the use of the land in its natural condition without interference  
13  
from others. With respect to the interference with underground water, the old "natural right" to absolutely control percolating waters going through ones land is now  
14  
appearing as a "correlative right". What was once a natural right on behalf of every landowner to do as he pleased with waters is now a correlative right in all par-  
15  
ties that reasonable user be the standard. This not only goes to show the dynamics of our law as guided by the attitudes and conceptions of people, but as well, that a dated definition is a static thing, subject to becoming over-  
16  
aged and recast in the light of tomorrow. Thus, on the

13. 3 Tiffany, Real Property, §714, (3d ed. 1939).

14. Id. at § 746.

15. City of Pasedena v. City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 (1949) and Jones v. Oz-Ark-Val Poultry Co., 306 S.W. 2d 111 (Ark. 1957).

16. Tiedeman, The Unwritten Constitution of the United States 76, (1890): "The so-called natural rights depend upon, and vary with, the legal and ethical conceptions of the people. As presently developed, the doctrine of natural rights may be tersely stated as a freedom from all legal restraint that is not needed to prevent injury to others...."



modern side of "natural--correlative rights" the Oklahoma court  
17  
said:

"...Nature does not provide proper underground restraining barriers which will prevent one man's wrongful production practices from affecting the whole reservoir...."

In a day that has passed for some courts, and by some courts even today, this philosophy would have been and is: Since nature provided no barrier, there is no barrier (or there is no barrier unless the legislature erects one.)

#### Background of the rights involved

In 1859, the same year that Col. Drake was struggling to bring in his oil well in Titusville, Pennsylvania, the House of Lords was struggling with problems concerning water rights, that were soon to be reconsidered in the law of oil and gas  
18  
in America. Lord Kingsdown declared that the decision was one of the most important ones "that ever came under the con-  
19  
sideration of a court of justice". It is most certain that none of the Lords knew that they were dealing with such matters later to become known as "The Rule of Capture", and "Correlative Rights", as they are referred to in oil and gas law. Still, their observations during the lengthy perscrutation of the rights involved were much the same as those later used by American judges when they were required to adjudicate rights concerning the exploitation of oil sands.

In the English case, the plaintiff Chasemore owned and  
17. Spiers v. Magnolia Petroleum Co. 206 Okla 503, 244 P. 2d 852, 855 (1952). (Quotation from brief, adopted by court.)  
18. Chasemore v. Richards, 1 Eng. Rul. Cas. 729 (Ex. 1859).  
19. Id. at 758.



operated an ancient mill on the River Wandle, about one mile away from the town of Croydon. The millstream was fed by waters "....some flowing as little surface streams into the river; and in other instances finding their whole way underground into the river."<sup>20</sup> The defendant, representing the town, dug a 74 foot well and proceeded to pump large quantities of water, in a reservoir, for use of the townspeople. The taking of the underground waters through the well dried up the river sufficiently to cause loss to the plaintiff in the operation of his mill.

The House of Lords held that this was a case of damnum absque injuria, relying heavily upon the earlier case of Acton v. Blundell.<sup>21</sup>

Chasemore's barrister urged that there was a "natural right" that owners overlying subterranean waters only use a reasonable amount--and that this reasonable amount was exceeded in the case at bar. He referred to a criticism of Acton v. Blundell case by Baron Parke in the "Law Journal" which went, "This Court and, I believe, all other Courts disapprove of that part of the judgment which denies the natural right to the water."<sup>22</sup> This natural right of which he was speaking was what the plaintiff argued in the Acton

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20. Op. Cit. supra note 18, at 730.

21. 12 Mee. & Wels. 324, 152 Eng. Rep. 1223 (Ex. 1843).

Here the mining operations of the defendant drained the plaintiff's (also a mill owner) wells dry.

22. Op. Cit. supra note 18, at 737.



source of supply by ordinary use.

The Lords were impressed, however, with the practical uncertainties of underground waters in their search for an answer to the adjudication of the parties' rights. These practical uncertainties--not knowing where the water came from, how far it travelled, or how much there was--and thus not knowing how to make a fair apportionment, were the same uncertainties that were later to bedevil judges in oil and gas cases and to furnish suasion for the rule of capture. Without knowledge of these facts pertaining to underground waters, their Lordships felt that the plaintiff's claimed rights were too indefinite and unlimited to deserve judicial protection. Further, as one of his Lordships observed, the well under consideration was sunk to supply the entire town of Croydon. He reckoned that if every family had sunk a well in Croydon, a greater total drain of the water supply would probably result, and the plaintiff would have to concede that there would be no injuria, even if he were damaged.

American courts during the same period were equally at a loss in arriving at a rule of apportionment of underground waters without facts of their nature:

"The secret, changeable, and uncontrollable character  
of underground water in its operation is so diverse

- 
23. He urged that it would be proper for neighbors to dig wells for their "occupational purposes" although it might work an injury on one, or some, of the neighbors. He urged further that the use by the defendant of steam engines, etc., was unreasonable curtailing his enjoyment of the water.







and uncertain that we cannot well subject it to the  
regulation of law."<sup>24</sup>

The Ohio court was likewise reluctant to tread upon an  
unknown field:

"The law recognizes no correlative rights in respect to  
the underground water percolating, oozing, or filtering  
through the earth, and this mainly...because the exist-  
ence, origin, movement, and course of such waters, and  
the causes which govern and direct their movements, are  
so secret, occult, and concealed that an attempt to  
administer any set of legal rules in respect to them  
would be involved in hopeless uncertainty, and would be,  
therefore practically impossible."<sup>25</sup>

Having in mind the above water cases and having in mind  
the history and temperament of the early days of oil devel-  
opment, the failure of American courts to recognize correl-  
ative rights from the beginning is understandable. If, after  
centuries of experience with a substance so vital as water,  
the physical facts of its nature were unknown, it could  
hardly be expected that the physical facts of this new and  
more mysterious liquid would be learned in a short time.  
So, the decisions building up the law of the nature of the  
landowner's interest were based "...upon the physical and  
economic facts of oil and gas as they [the Judges] knew  
them..."<sup>26</sup>

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24. Chatfield v. Wilson, 28 Vt. 49 (1855).

25. Frazier v. Brown, 12 Ohio 294, 310 (1861).

26. 1 Summers Oil & Gas, 175, §63 (perm. ed. 1954).



As far as the physical facts were concerned, the following classic quotations, although sometimes eloquent, have common denominators of uncertainties or errors:

"The proof shows that the oil was drawn from a stream or current flowing underground, and reached by the pump.." <sup>27</sup>

"The discovery of petroleum led to a new form of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon <sup>28</sup> experience."

"Oil and gas move through the interstitial spaces or crevices in search of an opening through which they <sup>29</sup> may escape."

"...oil...becomes...the property of the person in whose well it came...this is so whether the oil moves, percolates or exists in pools and deposits." <sup>30</sup>

"Petroleum oil is a fluid in the porous sandrock of the earth. In some instances it doubtless exists in pools, but where are the pools located? They may be under the lands in which the well is drilled or...in the <sup>31</sup> abutting or remote lands."

"oil...is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent and

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27. Hail v. Reed, 54 Ky. 383, 387 (1854).

28. Brown v. Vandergrift, 80 Pa. 142, 147 (1875).

29. Hague V. Wheeler, 27 Atl. 714, 719, 157 Pa. 327, 85 A.L.R. 1156 (1893).

30. Kelly v. Ohio Oil Co., 57 Ohio 317, 47 N.E. 399, 401 (1897).

31. Wagner v. Mallory, 169 N.Y. 501, 62 N.E. 584, 585 (1902).



32

trend of its flow is uncertain."

"....fugitive minerals, oil and gas, while at large beneath the surface of the earth, are not...the subject of private ownership."

33

And, as late as 1925:

"....oil in its normal state is of a fugitive nature, restlessly and ceaselessly moving about in the bowels of the earth in response to natural forces and influences which have never been fathomed or mastered by human science..."

34

Now, of course, with wisdom of hindsight, it is recognized that the courts were unduly concerned about oil's location and in error about its propensity for roaming through the underoil.

35

The early economic climate in the oil and gas industry had no room for conservation measures. Uses for "mineral oil", "Seneca oil" and "Rock oil" were rather limited. At first the oil was used primarily for illumination and medicinal purposes. Soon after it came to be used for lubrication. From a paper by Timothy Alden called, "Antiques and

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32. Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 P. 296, 297 (1903).

33. Frost-Johnson Lumber Co. V. Sallings Heirs, 150 La. 756, 91 So. 207, 212 (1922).

34. Texas Pacific Coal and Oil Co. v. Comanche Duke Oil Co., 274 S.W. 193, 194 (Tex. Civ. App. 1925).

35. Elliff v. Texon Drilling Co. 146 Tex. 575, 210 S.W. 2d 558, 561 4 ALR 2d 191 (1948). "In the light of modern scientific knowledge these early analogies have been disproven and courts generally have come to recognize that oil and gas, as commonly found in underground reservoirs, are securely trapped in a static condition...and so remain until disturbed by penetration from the surface." Cf. Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, 940, 87 S.W. 2d 1069, 101 ALR 1392 (1935).



Curiosities of Western Pennsylvania", published in 1820,  
comes the following:

"This oil is much esteemed for its efficacy in removing rheumatic complaints. It burns well in lamps, and might be advantageously used in lighting streets. If, by some process, it could be rendered inodorous, it would become an important article for domestic<sup>36</sup> illumination."

Henry Ford's mass production of the internal combustion horseless carriage was almost a half century away when Drake brought in his oil well. Space and industrial heating was, of course, still by wood and coal. Ships were still largely in sail. For the industry, the period prior to 1900 has been<sup>37</sup> termed as the "shirt losing" period. This is not entirely apt, as some flourished from the beginning. However it did take time for the industry to settle down to the task of the<sup>38</sup> creation of a petroleum economy.

The last half of the nineteenth century was a time for grabbing the riches in the land and the land itself. Frontiers were becoming further away and harder to find. The land rushes, the gold rush of '49, to the Comstock Lode in

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36. Giddons, Pennsylvania Petroleum 1750-1872, 7 (1947).

37. American Petroleum Institute Quarterly, Centennial Issue 21 (1959)

38. Clark, The Oil Century, Ch. 7 & 8 (1958) and Schackne and Drake, Oil for the World, Ch. 1, (1950).







'61, and to the Klondike and Nome in the 90's set the pulse of the times. Valuable resources, such as timber, were destroyed to get at more immediately valuable resources. Self help and the six-shooter were depended upon largely to settle disputes and were found to be more expeditious than courts. It was a time of laissez faire and "finders keepers".<sup>39</sup> The strong and the cunning survived. It took a while for the choking financial power of the corporate giant to catch up, so individuals dealt upon comparatively even terms.

With this background, the "rule of capture" was bound to emerge unsullied by any nice refinements relative to waste and "just and equitable share from the common source of supply", and to be the dominant force in the correlative<sup>40</sup> rights of landowners.

And so it did.

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39. Glasscock, Then Came Oil, 257 (1938).

40. Oil was truly trapped and captured along Oil Creek in Pennsylvania in 1807. "The mode of collecting it is this: the place where it is found bubbling up in the creek is surrounded by a wall or dam to a narrow compass, a man then takes a blanket, flannel, or other woollen cloth, to which the oil adheres, and spreading it over the surface of the enclosed pond, presses it down a little, draws it up, and running the cloth through his hands, squeezes out the oil into a vessel prepared for that purpose; thus twenty or thirty gallons of pure oil can be obtained in two or three days by one man." Giddons, Pennsylvania Petroleum 1750-1852, 6 (1947).



"The good old rule, the simple plan,  
That he may take who has the power,  
And he shall keep who can."

So the rule of capture has been described in a rather  
41  
impassioned criticism of it. Very early, however, it  
was settled that the season on this substance often compared  
to wild game was not an entirely open one. In a Kentucky  
42  
case, the defendants trespassed on plaintiff's land and  
used his oil well to get three barrels of oil (then worth \$1.  
25 per gallon). In resisting an action of detinue to recover  
the oil, defendants likened the oil to an underground stream  
of water. They conceded that they had trespassed but urged  
that P had never reduced this non-unique substance to his  
possession and therefore it wasn't his. The court, with some  
difficulty, rejected this argument, holding that by having  
a well the plaintiff had devised a receptacle for its cap-  
ture sufficient to reduce it to his possession and property.  
Thus a rule of property, of sorts, was established. In re-  
cognizing a difference between water and oil, the court  
stated:

"Then besides the fact that water is not oil, and that  
while nature furnishes the former almost everywhere, for  
the common use of man, as being a universal necessity,

41. Pettengill, Smoke Screen 96 (1940). For a scholarly  
review of the rule, see Hardwicke, The Rule of Capture and  
Its Implications as Applied to Oil and Gas, 13 Texas L.  
Rev. 391 (1935). See also Kuntz, The Law of Capture, 10  
Okla. L. Rev. 406 (1957).

42. Hail v. Reed, 54 Ky. 383 (1854).



she furnishes the later, for the most part, only as the result of arduous labor and intricate processes,<sup>43</sup> and but rarely procures it in its perfect state...."

While this case by no means settled the nature of the landowner's interest in oil and gas, it did express the rationale that one should be rewarded for his enterprise---which was not forgotten, even if not articulated, in cases to follow.

States then proceeded to build rules regarding the nature of the landowner's interest in gas and oil. Two classic theories were developed. One was that the landowner had no ownership of the oil and gas in place, but it became his absolutely after he had acquired possession of it. This is referred to as the "non-ownership" theory. Another was that the overlying landowner owned all of the gas and oil in place under his soil. This was called the "ownership" theory. The later theory presented a logical difficulty in resolution with the rule of capture. If A was the owner of all the oil and gas that he could reduce to his possession, what was the status of the oil and gas that probably came from his neighbor, B's land, when B was the absolute owner of all beneath his land? Stated otherwise and rhetorically, if B was the owner of all the oil and gas under his land, what manner of legerdemain was it that made it A's property by his simple act of capture?

The rule of capture, however, transcended these classic

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43. Id. at 391.



theories of ownership of the mineral estate. The "non-ownership" states found the rule of capture easy to come by as there was no property interest in the oil and gas until it was reduced to possession.<sup>45</sup> In the "ownership"

states, such as Ohio,<sup>46</sup> the rationale of the rule of capture was a "now you see it now you don't" sort of thing. The owner had title to all oil and gas in place beneath his lands, but, when it was drained off, he lost title.

The doctrine of correlative rights, prior to the case of Ohio Oil Co. v. Indiana, made virtually no inroads upon the full swath of the rule of capture. Courts did not reject correlative rights as an equitable consideration. At the same time they would not temper their decisions with them--- other than to suggest that correlative rights might receive some protection, should the legislatures chose to speak out against waste and injury to property.

No waste, no boundary crowding. The case that is

44. For a listing of states following either "ownership" or non-ownership" theories, see Andrews, Correlative Rights Doctrine in the Law of Oil and Gas, 13 So. Cal. L. Rev. 185, 189 (1940).
45. Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 1075 (1900): "If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make production of his wells as large as possible?" Cf. Greenshields v. Warren Petroleum Corp., 248 F. 2d 61, (10th. Cir. 1957), cert. den., 355 U.S. 907. Here Oklahoma's "non-ownership" rule was recognized.
46. Kelly v. Ohio Oil Co., 57 Ohio 317, 49 N.E. 399, 401 (1893): "...it forms a part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract;... and it is raised to the surface, and then for the first time it becomes the subject of distinct ownership, separate from the realty...." Cf. Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W. 2d 558 (1948).







uncomplicated by any senseless waste or appearance of crowding of boundaries does not, on its facts, arouse much apathy for the unrestrained rule of capture. Such was an early Indiana case.<sup>47</sup> Here, the Gas Company had a gas well on a lot in the City of Greenfield. The plaintiffs had some adjoining lots upon which there were no wells. Nothing in the case report indicates that the plaintiffs had any intention of drilling for gas on their property. The court decided that the fact that the shooting of the gas well with nitroglycerin was likely to increase the flow of gas from under Ps' lots to D's gas well was no cause for injunctive relief.

Boundary crowding. In the case of Kelly v. Ohio Oil Co.<sup>48</sup> the defendant corporation, unlike the gas company in the Indiana case, had plenty of acreage to work with. It had large acreage under lease on two sides of Kelly's property line. The plaintiff alleged that the custom was that wells were to be placed 200' distant from property lines. However, D was in the process of marching his wells in a row along the property lines, just 25' away from the boundary. It appeared that the only purpose of drilling the wells so close to the boundary was to extend the drainage area across the boundary. The court refused to grant an injunction, pointing out that there was no certain knowledge<sup>49</sup> of where the oil was coming from. The court also considered it intolerable that one should be compelled to submit

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47. Peoples Gas Co. v. Tyner, 131 Ind. 277, 31 N.E. 59 (1892).

48. 57 Ohio 317, 49 N.E. 399 (1893).

49. Id. at 401.



to a court of equity or his neighbor for what they might  
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think was a reasonable use of property.

Injury as a weapon in bargaining. Upon examination of  
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the Pennsylvania case of Hague v. Wheeler, the seamier side  
of the rule of capture begins to show. Here, D drilled a  
gas well on his property at the suggestion and request of P,  
a gas company. There had been an arrangement between P and  
D whereby D had indicated that it might buy the well or pro-  
duction of P. D was unable to dispose of his gas in commer-  
cial quantities. Negotiations for sale to P were unsuccessful.  
D, therefore, let the gas from his well escape into the air.  
This threatened to reduce the ultimate flow of P's wells so  
P entered and capped D's well. P next obtained an injunction  
prohibiting D from removing the cap. In granting the injunc-  
tion, the lower court had declared that no owner should be  
permitted to carry on his operations in reckless or lawless  
irresponsibility, but must submit to such limitations as are  
necessary to enable each to get his own. This judicial esp-  
ousal of correlative responsibilities and rights was short-  
lived. It was reversed by the Supreme Court of Pennsylvania  
and the injunction dissolved.

The Supreme Court reasoned that if the gas could be put  
to some useful or profitable purpose by D, it was his privi-  
lege to do so. The Court saw no alteration of the owner's  
absolute domain over the gas by the fact that D could not or  
did not profitably dispose of it. The Court exemplified:

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50. See Letts v. Kessler, 54 Ohio 73, 42 N.E. 765 (1896).  
51. 157 Pa. 324, 27 Atl. 714 (1893).



A owns a saw mill. His neighbor B stacks up good wood that could profitably be used by A and burns it on his own land. B's act is entirely lawful. "The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it." <sup>52</sup> The example is poorly drawn, as it begs the issue. In the case of the timber, there is no lawful way for A to take B's timber without B's consent. But A could, by a gas well on his own land, take gas from a reservoir underlying B's. Why? Because the nature of the substance and because the rule of capture says so.<sup>53</sup> This lays bare the correlativity in the rule of capture itself. Capture is a correlative right. The rub comes in the dimension--in fitting the right(s) into an equitable and symmetrical mosaic which portrays both reward to the enterprising and deterrent to the ruthless.

The language of the court does not fit in such a portrait:  
<sup>53</sup>

"...so long as he can reach it and bring it [gas] to the surface it is his absolutely, to sell, to use, to give away or to squander...."

And then:

"In the disposition he may make of it he is subject to two limitations; he must not disregard his obligation to the public, he must not disregard his neighbor's rights."

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52. Id. at 719.

53. Id. at 720.



As far as protection to the public was concerned, the court felt that waste prevention policy should come from the legislature. And, as far as the neighbor's rights were concerned, the court apparently would have required some injury to the neighbor's property that was more identifiable than the loss of profits.

Judicial Approval of Economic Waste. When a state saw fit to forbid specific acts of waste by legislation, the judiciary had little difficulty in upholding the conservation measure as a proper exercise of the police power. So, in Indiana, in Townsend v. State,<sup>54</sup> the conviction and fine of \$1.00 and costs for violation of the statute forbidding the burning of a flambeau gas light was upheld.

Without such legislation, however, the Pennsylvania<sup>55</sup> court as much as gave its blessing to economic waste. Here, the defendant company used a gas pump on each of its wells in the then near depleted McCurdy Oil Field in Pennsylvania. Among the court's findings of fact were: (1) the gas pumps increased the flow of gas and oil in D's wells, (2) use of a pump by one operator necessitated use of pumps by all operators in the immediate neighborhood, if they desired to prevent the daily production of their wells from being decreased, (3) P's production decreased when D used pumps and came back to normal when D shut off his pumps, (4) if pumps are placed on all the wells the production of the wells is neither increased nor diminished (sic), and

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54. 147 Ind. 624, 47 N.E. 19 (1897).

55. Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074 (1900).







(5) pumps cost \$50 to \$60.

The court denied the requested injunction, reciting that the defendant's lawful right to exploit couldn't be curtailed to prevent his neighbor from loss. Based upon the above findings, if one landowner who had access to the common source of supply decided upon a quicker rate of recovery, it behooved his neighbors to make the same decision. The ultimate recovery of wealth would not be any greater, and they would all be poorer by the price of the pumps.<sup>56</sup>

Such was the law prior to Ohio Oil Co. v. Indiana. As will be seen, this decision was to render no sudden metamorphosis in the doctrine of correlative rights, but it did encourage a change in philosophy in regard to the nature and scope of the rights protected.

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56. The words of the Supreme Court of California, in overturning the rule of capture, as it related to underground water, sound appropriate here: "...They will have absolutely no protection in law against others having stronger pumps, deeper wells, or a more favorable situation, who can thereby take from them unlimited quantities of the water, reaching to the entire supply, and without regard to the place of use. We cannot perceive how a doctrine offering so little protection to the investments in and product of such enterprises, and offering so much temptation to others to capture the water on which they depend, can tend to promote developments in the future or preserve those already made...." *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766 (1903). Compare: *Frazier v. Brown*, 12 Ohio 294, 311 (1861) "Because any such recognition of correlative rights, would interfere, to the material detriment of the common wealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and the general progress of improvement in works of embellishment and utility."



Around the turn of the century, there was a large active "gas belt" in Eastern Central Indiana situated over a large Trenton rock gas and oil reservoir. The state brought an action against the Ohio Oil Company, *inter alia*, to enjoin them from continuing to allow gas to escape from their oil wells that were drawing from the reservoir. The action was brought under a statute forbidding the acts complained of. The defendant company showed how it had openly invested much money in the oil business in this area, how oil was more valuable than gas, how oil would be of value to the community, and how it had used skill to get the oil and was only using ordinary methods to recover it.

The State, on the other hand, showed how defendant's practices were depleting the reservoir pressure, how the gas belt was supporting State Institutions and providing cheap fuel for manufacturing purposes, and how the gas was generally adding wealth to the State and weal of the public.

In upholding the injunction, Mr. Justice White, for the Court, saw it lawful to drill in any part of the reservoir, even though it meant that the entire volume of gas and oil would in some measure be decreased thereby. But, he observed, if there be no power to prevent any waste, anyone with the right to drill would have the "...unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to be dispersed....with-<sup>57</sup>out use or benefit to anyone."

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57. 177 U.S. 190, 201 (1900).



Mr. Justice White next observed it was doubtful that people could be entirely divested of their rights to take gas and oil--as they could with *ferae naturae*. However, he saw this right to take limited:

"But there is a co-equal right in them all to take from a common source of supply....It follows from the essence of their right....that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others, or by waste by one or more, to the annihilation of the rights of the remainder."<sup>58</sup>

What was said, as well as what was unsaid, is of import here. It was declared that landowners have a co-equal and restricted right to exploit and that this right was of sufficient strength to justify legislation prohibiting activity that was other wise lawful. It does not declare that, but for the legislation, there would be no co-equal rights.

As the need developed in the eyes of the legislatures, the scope and detail of restriction expanded, tracing a decreasing spiral which marked the newly defined periphery of the rule of capture. So a Wyoming statute prohibiting the manufacture of carbon black was upheld.<sup>59</sup> A California

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58. Id. at 209.

59. Walls v. Midland Carbon Co., 254 U.S. 300 (1920). "A state may consider the relation of rights and accomodate their coexistence, and in the interest of the community, limit one that others may be enjoyed." Id at 315.





statute was upheld which forbade "unreasonable waste of natural gas", even though the test of reasonableness was given to an administrative body. Proration orders based upon daily market and ratable production, forced pooling, and price fixing along with a formula for ratable taking were tested and upheld by way of recognition of correlative rights as a subject justifying legislation.

With Ohio Oil Co. v. Indiana as a touchstone, and before the advent of widespread comprehensive legislation on the subject, a few courts were able, with an equitable approach and with the help of well pleaded facts, to curtail encroachments upon correlative rights without the crutch of a statute. One of the cases arose in the same area as did the Ohio Oil Co. case. Here the plaintiffs, a group of manufacturers, had extensive interests in the Indiana gas belt. The plaintiffs were using the gas to furnish their factories and to sell to many homes in the area which were heated with gas. The defendants were engaged in selling gas to the Chicago area (some 200 miles distant) and they were tapping the same reservoir as the plaintiffs. The defendants had put in two pumping stations which assisted them in a rapid recovery of the gas. They

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60. Bandini Co. v. Superior Ct. 284 U.S. 8 (1931).

61. Champlin Refining Co. v. Corporation Commission, 285 U.S. 210 (1931).

62. Hunter Company, Inc. V. McHugh, 320 U.S. 222 (1943).

63. Cities Service Gas Co. v. Peerless Oil and Gas, 340 U.S. 179 (1950).

64. Manufacturers Gas and Oil Co. v. Indiana Gas & Oil Co., 155 Ind. 461, 57 N.E. 912 (1900).





were threatening to put in another pumping station in the immediate area and had leased thousands of acres there. It was shown that the pressure in the reservoir had diminished from 325 psi in 1886 to 165 in 1900. Salt water intrusion was feared when the pressure reached 100 psi. It was also shown that it would be very expensive to convert the factories and homes to the use of coal. The prayer asked that the defendants be enjoined from using any pumping devices that would have the effect of increasing the natural flow of the gas. The court reckoned that the correlative right to take from the common reservoir was useless under the circumstance where one party had such an advantage, and granted the injunction. This decision was a courageous disavowal of the unlimited rule of capture. It would have been more facile to suggest that the plaintiffs also use pumps. Yet, the court surely felt, this would have been an invitation to increase the depletion of this valuable resource, to the detriment of those who found themselves living in close proximity to it.

Malicious waste prompted the Kentucky court to enjoin withdrawal from the common source of supply, in a case that closely followed.<sup>65</sup> Here, the Louisville Gas Company was getting competition from the Kentucky Heating Company in its business of supplying natural gas to Louisville. The former company caused a corporation to be formed (with money from

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65. Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368 (1903). See also Commonwealth v. Trent 117 Ky. 34, 77 S.W. 390 (1903).



officers of the Louisville Gas Co.) which bought up leases on the land in the environs of Kentucky Heating Company's wells. This new corporation succeeded in getting some good gas wells. Gas was fed to a lampblack factory day and night for five months. During this time the gas pressure of Kentucky Heating Company was reduced from 60 to 30 lbs. Such an unconscionable waste, found to be prompted by the motive of destroying the Kentucky Heating Company, was declared to be the proper subject of injunction, independently  
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of the waste statute.

The Louisiana Court granted relief to one whose neighbor stubbornly refused to plug his abandoned well, which said well allowed air to get in the plaintiff's pump, making  
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it inefficient. The court went deep into the stems of the civil law and concluded that the simple fact of neighborhood imposed certain limitations upon the faculties inherent

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66. "While natural gas is not the subject of ownership, the owner of the soil must, in dealing with it, use his own property with due regard to the rights of his neighbor. He cannot be allowed deliberately to waste the supply for the purpose of injuring his neighbor....A man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all...." Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368, 369 (1903). On the damage phase of the case at 132 Ky. 435, 111 S.W. 374 (1908), it was held that the lower court used the wrong method in treating the waste as a conversion. Kentucky being a "non-ownership" state, the damages should have been for "the value in money for the diminution of the natural flow of the gas at the wells..." (376-377) 67. Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919).



in ownership, "...and this is the reciprocal interest of the  
68  
owners." Although the court was clearly persuaded by the  
right of an owner to conduct any lawful operations on his  
own land, it could not permit the continuance of an act that  
was not beneficial to the actor, but merely harmful to his  
neighbor. \*

Two Michigan cases are very strong in their recognition  
of common law correlative rights---one to the point of re-  
quiring an allocation of production on the theory of conver-  
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sion. In another case, the Michigan court had announced  
that it would require an accounting in the event that an adj-  
oining landowner could not drill for oil on his land as a  
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result of a use restriction.

The beacon of Ohio Oil Co. v. Indiana did not lead all  
down the same path, however. The Pennsylvania court in Bar-  
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nard v. Monongahela Natural Gas Company, apparently did not

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68. Id. at 236, 82 So. at 209.

69. Ross v. Damm, 278 Mich.388, 270 N.W. 722 (1936). Cf. 294  
Mich.103, 292 N.W. 579 (1940).

70. Quinn v. Pere Marquette Ry. Co., 256 Mich.143, 239 N.W.  
376. Cf. Central Land Co. v. City of Grand Rapids, 302  
Mich.105, 4 N.W. 2d 485 (1942).

71. 216 Pa. 362, 65 Atl. 801 (1907). Cf. Brown v. Humble 126  
Tex.296, 83 S.W. 2d 935 (1935) and Gain v. South Penn Oil  
Co., 76 W. Va. 769, 86 S.E. 883 (1915).



consider the Ohio Oil Company case as a recognition of correlative rights that existed either with or without legislation. On the contrary, the rule of capture was accorded a status which clothed it with immunity from equitable considerations:

"...every landowner or his lessee may locate his wells wherever he pleases, regardless of the interest of others. He may distribute them over the whole farm or locate them on one part of it. He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What then can the neighbor do? Nothing; only go and do likewise....this may not be the best rule; but neither the Legislature nor our highest court has given us any better. No doubt many thousands of dollars have been expended in protecting lines in oil and gas territory that would not have been expended if some rule had existed by which it could have been avoided."<sup>72</sup>

As will be seen later, the legislatures have seen to it that courts do not have to choose between the difficult and equitable approach followed by the Indiana, Kentucky, Louisiana, and Michigan courts and the "hands off" approach which the Pennsylvania court reluctantly announced. This is fortunate in that the natures of the subject matters of prevention of waste and adjustment of correlative rights are more

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72. *Barnard v. Monongahela Natural Gas Company* 216 Pa. 362, Atl. 801, 802 (1907).





susceptible of equitable regulation and supervision by an administrative body designed for that purpose, than by a court. The task of determining whether an administrative body has acted within the terms of the statute and in furtherance of legislative policy is, by itself, a large one. Therefore, there has been an unwillingness to give liberal construction to existing regulations in order to reach an equitable result.

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For example, in a California case, the plaintiffs were conducting a large voluntary unit operation in Kern County. The defendants were operating on the same structure and had refused to be a part of the unit (Superior had apparently asked for an equity that was considered excessive). There was no compulsory unitization statute. The reservoir contained a condensate area and a so-called black oil area. The plaintiffs demonstrated how a decrease in pressure would cause retrograde condensation and loss of recoverable hydrocarbons. Further, solution gas was needed to remain in the black oil for the purpose of drive. The plaintiffs had built a cycling plant which helped maintain the pressure. The defendants had not joined in this recycling program, but were benefiting from it. The plaintiffs pointed out that they were reluctant to follow the same wasteful practices as were the defendants, but would have to, if the defendants were not forced to join the unit plan.

The prayer for relief was a complicated thing which

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73. *Western Gulf Oil Co. v. Superior Oil Co.*, 92 Cal. App. 2d 299, 206 P. 2d 944 (1949).



would have required the court to set up a unit operation and adjudicate the equities of everyone in it. In denying the relief the court recognized that the "right of an individual to operate as he pleases in extracting oil and gas from his own land is being subjected to increasing control and limitation in the interest of the public and of correlative over-<sup>74</sup>lying owners." but would not extend the intendment of the waste statute to cover forced unitization. To the same effect, the Arkansas court would not expand the statute<sup>75</sup> providing for voluntary unitization to require a unit operation even when all of the operators wanted the plan and all but royalty interests calculated at .003004% desired<sup>76</sup> the plan. A pertinent part of the case which demonstrated the vitality of the doctrine of correlative rights was the royalty owners' demand for royalties for the entire amount of oil recovered during the invalidated unit operation. It happened that the well on the plaintiff's land was an output well which produced more under the unit operation than it would have been allowed otherwise. Referring to their lease, which was then the valid operating document, the plaintiffs urged that they were entitled to royalties from all oil produced from their well. A rote application of the rule of capture would have supported this proposition. However, the court observed:

"There is no equity in the appellants' insistence

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74. Id. at 949.

75. Ark. Stat. Ann. §53-101 et. seq.

76. Dobson v. Arkansas Oil & Gas Commission, 218 Ark. 160, 235 S.W. 2d 33 (1950). See also Wood Oil Co. v. Corp. Commission, 205 Okla. 537, 239 P. 2d 1023 (1950).



that they should share in the fruits of unitization while being relieved of its burdens, those burdens being an immediate reduction in royalties for the sake of greater returns over a period of years.

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Common lessee cases. There are a group of cases, here-  
in called "common lessee cases" which serve to discredit the supremacy of the dominion of the rule of capture in the arena of conflicting interests of overlying landowners. These cases concern the rights of adjoining landowners who happen to have the same lessee. This is no uncommon event. But for the common agency of the same lessee the landowners would be facing each other across the line fence, watching for the next offensive move and girding themselves for the next defensive move of capture, i.e., of going and doing likewise.

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Even in Barnard v. Monongahela Natural Gas

Company where the remedy of self help was announced, it was realized that the granting of the leases by the landowners to a common lessee did, by contract, divest them of this remedy. The capturing was left up to the lessee. His interests were not always in harmony with development of both properties--especially if he could recover the valuable product in a single or a few operations. Therefore, it was announced that a common lessee may not fraudulently or evasively drill wells so as to drain one lessor's property, to the detriment of others. This phase of the case, con-

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77. Dobson v. Arkansas Oil & Gas Commission, 218 Ark. 160, 235 S.W. 2d 33,37 (1950).

78. Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907).



cerning the protection of the landowner's privilege to conduct his operations so as to obtain a fair share of the underlying wealth has been cited more than the "go and do  
79  
likewise" phase.

The privilege to conduct operations (or have them conducted) so as to obtain a fair share is of some substance when it has the vigor and resilience to sidestep an express covenant and to overcome the implication that the complaining landowner's interests were satisfied by the acceptance  
80  
of delay rentals.

In the case referred to, Phillips was the lessee of the plaintiff and also leased the adjoining land. Phillips brought in producing wells within 570', 1300' and 580' of the plaintiff's land. The lease required offset wells when producers were drilled within 150 feet. While plaintiff had accepted delay rentals, Phillips was notified that plaintiff's land was being drained and protection was demanded against depletion. It was held that there was no implied covenant of development because of the express covenant to offset. Therefore there was no duty to offset.

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79. *Lamp v. Locke*, 89 W. Va. 138, 108 S.E. 889 (1921). (Here a mandatory injunction required the lessee to drill an offset well when he conspired with adjoining owner to draw off all gas by a well 5' from the line.), *Trimble v. Hope Natural Gas Co.*, 113 W. Va. 839, 169 S.E. 529 (1933), *Dillard v. United Fuel Gas Co.*, 114 W. Va. 684, 173 S.E. 573 (1934), *Warfield Natural Gas Co. v. Allison*, 248 Ky. 646, 59 S.W. 2d 534 (1933), and *Plains Petroleum Corp. v. Fine*, 174 Okla. 570, 51 P. 2d 284 (1935).

80. *Millette v. Phillips Petroleum Co.*, 209 Miss. 687, 48 So. 2d 344 (1950), 221 Miss. 1, 72 So. 2d 176 (1954), and 74 So. 2d 731 (1954).







However, it was announced that it was the public policy of the State to protect correlative rights and that there was an implied covenant that the lessee would not do anything to impair the value of the complaining lessor's lease. The lessee was burdened with the duty to use reasonable care to protect the lessor from damage or loss by his affirmative act: "The equitable duty, existing as well under implication, to conserve the mineral resources of lessors or to re-<sup>81</sup>frain from depletory acts survives unimpaired." Furthermore, the acceptance of delay rentals didn't destroy the<sup>82</sup> lessee's equitable duty, and the injured landowner was entitled to damages for the lost royalty, even though this would be tantamount to a payment of a double royalty.

It should be noted that the chain of correlativity is broken in this case in that the gain of the complaining landowner would not always redound to the detriment of the adjoining landowner. However, it is to be expected that the disinclination of the lessee to pay double royalty would motivate an equitable development of both tracts, with an end result tending to satisfy the complaining landowner.

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81. *Id.* at 690, 48 So. 2d 344 (1950)

82. *Contra*: *Hutchins v. Humble Oil & Refining Co.*, 161 S.W. 2d 571 (Tex. Civ. App. 1942) and *Coats v. Brown*, 301 S.W. 2d 932 (Tex. Civ. App. 1957). Also, where lease required notice as a condition precedent to any required action by the lessee to prevent damage by drainage, lessor could not collect damage without giving the notice, where no concealment was involved. *Billeaud Planters, Inc. v. Union Oil Co. of Calif.*, 245 F. 2d 14 (5th Cir. 1957).



The Millette case is not an isolated one. While the study of the relationships involved is in the subject matter of implied covenants,<sup>84</sup> it has incisive relevancy here, as the forces of law place upon the lessee the duty to attempt to obtain for each of his lessors a proportionate share from the common source.

Tortious invasions of the rights protected.

Examples of tortious invasions of the rights protected do, insofar as they broaden the spectrum of prohibited activity, assist in the understanding of correlative rights.<sup>85</sup> The prohibited conduct ranges from trespass,<sup>86</sup> through negligence per se as imposed by statute,<sup>87</sup> and conduct prohibited by an administrative body such as the Railroad Commission,<sup>88</sup> to simple negligence.

Once a property interest in the common source of supply is established, it follows that the common law rules relative

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83. See also: *Kleppner v. Lemon*, 176 Pa. 502, 35 A. 109 (1896) and 198 Pa. 581, 48 Atl. 483 (1901), *Hartman Ranch Co. v. Associated Busseyville Oil & Gas Co.*, 180 Ky. 545, 203 S.W. 515 (1918), *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S.E. 12, (1916), *Indian Territory Illuminating Oil Co. v. Haynes Drilling Co.*, 180 Okla. 419, 69 P. 2d 624 (1937), and *Blair v. Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S.W. 286 (1921).
84. See *Merrill*, Permitted Drainage, 4 Okla. L. Rev. 58 (1951).
85. *Alphonzo E. Bell Corporation v. Bell View Oil Syndicate*, 24 Cal. App. 2d 587, 76 P. 2d 167 (1938).
86. *Palmer Corp. v. Collins*, 214 Ky. 838, 284 S.W. 95 (1926).
87. *Loeffler v. King*, 228 S.W. 2d 201 (Tex. Civ. App. 1950), reversed on other grounds at 149 Tex. 626, 236 S.W. 2d 772 (1951). Thus drainage brought about by drilling a well at a closer distance than that allowed by the Railroad Commission is wrongful capture, and damages may be recovered.
88. *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W. 2d 558 (1948). For a query as to the basis for damages in such cases, see *Masterson*, Legal Position of the Drilling Contractor, First Annual Institute on Oil & Gas Law, Southwestern Legal Foundation, 183, 212 (1949).



to trespass apply. The trespass may take place above the  
ground, as in *Hail v. Reed*,<sup>89</sup> where the defendants, by  
stealth, came on the plaintiff's land and dipped some oil  
out of his well, or below the ground, by the means of slant  
drilling.<sup>90</sup>

If the conservation statutes call for certain acts,  
such as plugging a well, and harm results from the forbid-  
den act or omission, such as harm by water intrusion, the  
violation of the conservation statute is ample to show neg-  
ligence.<sup>91</sup>

The *Loeffler v. King* type of case<sup>92</sup> results in an award  
of damages to the landowner who complains that he was in-  
jured by some act in violation of the Commission's order or  
regulation. So, when one uses a vacuum pump in violation of  
the Railroad Commission's order, the injured party is entit-  
led to damages.<sup>93</sup> This result not only serves as a deter-  
rent to the violation of such orders or regulations, but it  
places a more visible tag of archaism upon the rule of cap-  
ture as a dominant force in the conflict of interests in  
the common source of supply.

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89. 54 Ky. 383 (1854).

90. *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, supra  
note 85.

91. *Palmer Corp. v. Collins*, supra note 86. Sometimes, how-  
ever, the conduct is tested in juxtaposition with reason-  
ability or prudence, even though the conduct is prohibited  
by statute. See *Atkinson v. Virginia Oil & Gas Co.*, 72  
W. Va. 707, 79 S.E. 647 (1913).

92. Op. cit. supra note 87.

93. *Peterson v. Grayce Oil Co.*, 128 Tex. 550, 98 S.W. 2d  
781 (1936).





The Elliff v. Texon Drilling Co. case is well known for its holding that the law of capture is no refuge when one negligently wastes the oil and gas of a common reservoir. Here the defendant was engaged in drilling an offset to the Elliff No. 1 gas well in the Aque Dulce Gas Field of Nueces County, Texas. As a result of a failure to use drilling mud of sufficient weight, the well blew out, caught fire and cratered, the later process engulfing and destroying Elliff No. 1. The court declared that:

"...a reasonable opportunity to produce his fair share of the oil and gas is the landowner's common law right under our theory of ownership in place."

The court also believed that the triumvirate of the rule of capture, conservation statutes, and orders of the Railroad Commission "afford(s) each owner a reasonable opportunity to produce his proportionate part of the oil and gas from the entire pool, and to prevent operating practices injurious to the common reservoir."

In addition to damage and/or unnecessary waste proximately caused by blowouts, shooting, air intrusion from

94. 146 Tex. 575, 210 S.W. 2d 558 (1948). Comments: 27 Texas L. Rev. 349, 62 Harv. L. Rev. 146, 20 Miss L. J. 96, and 2 Vand. L. Rev. 326.

95. Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W. 2d 558 (1948).

96. Id.

97. See Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928), and In re Deep Rock Oil Corp., 16 F. Supp. 777 (D.C. Okla. 1936).

98. Comanche Duke Oil Co. v. Tex. Pac. Coal & Oil Co., 298 S.W. 554 (Tex. Civ. App. 1927) and Liner v. U.S. Torpedo Co., 12 S.W. 2d 552 (Tex. Civ. App. 1929).





failure to plug, or water intrusion from failure to

100

plug may form the basis of an action by those who have

101

been injured thereby. In a recent case a lessee's contract right to explore was protected by an action in tort.

The defendant, representing a competitor of the lessee,

conducted seismic tests on the land covered by plaintiff's

5

lease. The plaintiff was awarded damages in the total sum

of the original consideration which he paid for the lease

and the annual rentals which he had paid. It is question-

able whether this would result in any protection to the

landowner's interest in obtaining a fair and equitable

share of any underlying valuables. It does however, limit

the right of exploration, a necessary prelude to exploitation.

Louisiana at one time refused damages for the gradual exhaustion of the common reservoir when the defendant drilled his gas well in such a manner as to cause it to blow out.

102

While the facts showed that 10 million cubic feet of gas was escaping daily, the court felt that it was impossible to assess damages. This was apparently prompted by the inability to determine how much of the daily waste came from the plaintiff's portion of the reservoir and the

Hague v. Wheeler rationale that if such an amount of gas

were being taken properly from the reservoir, the plaintiff

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99. Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919). Cf. Nisbet v. Van Tuyl, 241 F. 2d 874 (Ky. 1957).

100. Atkinson v. Virginia Oil & Gas Co., 72 W. Va. 707, 79 S.E. 647 (1913).

101. Tinsley v. Seismic Explorations, Inc. of Del., 111 So. 2d 834, (La. App. 1959).

102. Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 103 So. 23 (1925).



would have no cause of complaint. It was held, however, that the plaintiff in such cases would be entitled to an injunction to enjoin the waste and abate the private nuisance.

Another Louisiana case that was in litigation for a long period of time, at last resulted in a holding that damages could be recovered.<sup>103</sup> In the first case landowners within a mile radius joined together as plaintiffs and alleged that as a result of defendant's negligence his gas well in Richland parish blew out. Specific acts of negligence, such as using old pipe, violation of safety regulations, and having drunken drillers in employ, were set out. The well remained uncontrolled for 1165 days. The plaintiffs asked for damages based upon damage to the reservoir and based upon the estimated amounts of their lost royalties. The court wasn't convinced that the acts were negligent and asserted that the requested damages were too speculative. Also, since Louisiana was not an "ownership" in place state, the court was reluctant to rest any money recovery on the value of uncaptured gas. Leaving the door open on the question of negligence, the court suggested a possibility of damages measured by a depreciation of the land values as a result of defendant's act. In the 1936 case, the negligence was proven to the

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103. McCoy v. Arkansas Natural Gas Co., 175 La 487, 143 So. 383 (1925) and 184 La. 101, 165 So. 632 (1936).



satisfaction of the high court and the case was returned only because the lower court had not permitted the plaintiffs to show their damages, measured by their suggested method.

Sometimes the alleged tortious invasion is measured by the so-called "prudent operator" test.<sup>104</sup> Since that test is so firmly established in the atmosphere surrounding the jural relationships between the lessee and the lessor, it would probably be better to leave it there. The accepted test of negligence, e.g.--how would a reasonable and prudent man conduct himself in the same or similar circumstances?---would suffice here. Besides, the "prudent operator" as far as his lessor is concerned may not be a reasonable and prudent man as far as the lessor's neighbor is concerned.

The "Good Samaritan" doesn't have to guarantee the success of his labors. In the Ivey v. Phillips Petroleum Co.<sup>105</sup> case a wild and abandoned well had blown out and was cratering between the lands of the plaintiff and the defendant. The defendant volunteered to kill the well, but was unable to do so. The defendant did not have to respond in damages to the plaintiff. The court first held that the Texas waste statute was not intended to cover the attempted killing of a wild well. Also, implicit in the holding, was that one who volunteers must leave those with claimed injury in a worse position than they would have been without such efforts.

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104. Larkins-Warr Trust v. Watchorn Petroleum Co., 198 Okla. 12, 174 P. 2d 589 (1946).

105. 36 F. Supp. 811 (D.C. Tex 1941).





The Rights as Subjects of Legislative Policy and Definition

Beyond cavil all laws pertaining to conservation and prevention of waste have had their effect upon correlative rights. Such regulatory measures were designed for the good of the public when the public need came to be realized. Well spacing requirements, proration, and laws relating to unit operations, both permissive and mandatory, were bound to and did have a marked effect upon the "just and equitable share" of each landowner or producer. It should be remembered, however, that correlative rights are not the product of such legislation. Probably the reverse is the case. Nonetheless, the common law doctrine of correlative rights, in the 60 years since it was given strong recognition and stature in the Ohio Oil Company v. Indiana case, appears to have been given more practical definition by the legislatures than by the courts. From an examination of some of the statutes defining "correlative rights" and "just and equitable share", which incorporate some of the complex details of today's knowledge of the physical nature of oil and gas in place, one can come to sympathize with the judicial reluctance to preside over and adjudicate these details, because of their complexity.

109                      110                      111                      112  
Alaska, Colorado, Nevada and Utah define

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106. See Hoffman, Voluntary Pooling & Unitization, (1954) and Meyers, The Law of Pooling and Unitization, (1957).  
107. 1 Summers Oil & Gas, 190, §63 (perm. ed. 1954).  
108. Kulp, Oil & Gas Rights §10.97 (1954).  
109. Alaska Comp. Laws Ann. §47-7-2 (Cum. Supp. 1958).  
110. Colo. Rev. Stat. §100-6-3(13) (1953).  
111. Nev. Rev. Stat. 522.010(2) (1957).  
112. Utah Code Ann. 40-6-4(j) (1953).





correlative rights by statute. Of these, Alaska and Nevada have given the same and most comprehensive definition:

"Correlative rights shall mean the opportunity afforded, so far as practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil and gas, or both, in the pool; being an amount, so far as can be practically determined, and so far as can practicably be obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both under such property bears to the total recoverable oil or gas or both in the pool, and for such purposes to use his just and equitable share of the reservoir energy."

Colorado would allow each owner and producer an "equal opportunity" to produce his share and the definition makes no mention of reservoir energy:

"The term 'correlative rights' shall mean that each owner and producer in a common pool or source of supply of oil and gas shall have an equal opportunity to obtain and produce his just and equitable share of the oil and gas underlying such pool or source of supply."

Utah's definition is very cryptic and is of little assistance in exploring the doctrine:

"The term 'correlative rights' means the owners' or producers' just and equitable share in a pool."



In so far as Utah's definition would imply that "correlative rights" means common or joint ownership of the oil or gas, as distinguished from a common right to exploit it,  
113  
it does not reflect the common law.

New Mexico has, without specifically defining correlative rights, offered standards in the consideration of  
114  
their protection:

"In protecting correlative rights the commission may give equitable consideration to acreage, pressure, open flow, porosity, permeability, deliverability and quality of the gas and to such other pertinent factors as may from time to time exist, and insofar as is practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage."

Some states have declared the abuse of correlative rights to be waste. Thus, the rule making and enforcement authority of the conservation agencies comes directly into  
115  
play in the adjustment of correlative rights. Alabama,

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113. *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, 24 Cal. App. 2d 587, 76 P. 2d 167, 175 (1938). "This principal /that the owners of all the land embraced within the boundaries of an oil reservoir between various points in which the oil may migrate, own all the oil in that reservoir as tenants in common/ has no support...That the surface owners have a common and correlative right to take from such sand strata..is all that the cases mean when they speak of extracting...from a common source."
114. N.M. Stat. Ann. 65-3-13(c) (1953).
115. Ala. Code, Title 26 §179(25) I (3) (1940).



have the identical provision:

"Abuse of the correlative rights and opportunities of  
each owner of oil and gas in a common reservoir due  
to non-uniform, disproportionate, and unratable with-  
drawals causing undue drainage between tracts of land  
constitutes waste."

120                      121  
To the foregoing standard, Mississippi    and Colorado  
have added:

"...or resulting in one or more owners in such pool  
producing more than his just and equitable share of  
production from such pool."

Texas has placed the adjustment of correlative rights  
122  
in gas under the direction of the Railroad Commission:

"...The Commission shall prorate and regulate such  
production for the protection of public and private  
interests.....(b) In the adjustment of correlative  
rights and opportunities of each owner of gas in a  
common reservoir to produce and use or sell such gas  
123  
as permitted in this Article."

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116. Ark. Stat. Ann. §53-109 I(3) (1947).  
117. Fla. Stat. Ann. §377, 19(10)(k) (1957).  
118. Ga. Laws 1955, No. 366 §7 I(3).  
119. N.C. Gen. Stat. §113-389 (I)(3) (1952).  
120. Miss. Code Ann. §6132-08(k) (3) (1942).  
121. Colo. Rev. Stat. §100-6-3(12)(c) (1957 Supp.).  
122. Tex. Ann. Civ. Stat., Art. 6008 §10 (1949).  
123. Held to allow proration and regulation of daily gas  
well production from each common reservoir. *Corzel-  
ius v. Harrell*, 143 Tex. 509, 186 S.W. 2d 961 (1945).



Likewise, the Corporation Commission of Kansas is charged  
124 125  
with protecting correlative rights. So is the "Board"  
126  
in Oregon.

Other states have given further refinement and prof- 127  
fered definitions of "just and equitable share". Arkansas  
128  
and North Carolina have the same:

"Subject to the reasonable requirements for prevention  
of waste, a producer's just and equitable share of the  
oil and gas in a pool (also sometimes referred to as a  
tract's just and equitable share) is that part of the  
authorized production for the pool (whether it be the  
total which could be produced without any restriction  
on the amount of production, or whether it be an amount  
less than that which the pool could produce if no rest-  
riktion on the amount were imposed) which is substant-  
ially in the proportion that the recoverable oil and  
gas in the developed area of his tract in the pool bears  
to the recoverable oil and gas in the total developed  
area of the pool, insofar as these amounts can be as-  
certained practically, and to that end, the rules, reg-  
ulations, permits and orders of the Division shall be  
such as will prevent or minimize reasonably avoidable  
net drainage (that is, drainage which is not equalized  
by counter drainage), and will give to each producer

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124. Kan. Gen Stat. §55-603 (1957 Supp.)

125. State Department of Geology and Mineral Industries.

126. Ore. Rev. Stat. §520.065(1) (1953).

127. Ark. Stat. Ann. §53-114D (1947).

128. N.C. Gen. Stat. §113-392 (1952).





the opportunity to use his just and equitable share of the reservoir energy."

Cast in a more simplified style, this would appear:

S = just and equitable share

P = authorized production from the pool

$\frac{1}{T}$  = recoverable oil and gas in any portion of tract

$\frac{1}{T}$  = recoverable oil and gas in entire tract

Thus,  $S = \frac{T}{T} P$ .

To the terms of the foregoing North Carolina and Arkansas statutes, Alabama and Louisiana have added:

"In determining each producer's just and equitable share of the authorized production for the pool, the board is authorized to give due consideration to the productivity of the well or wells located thereon, as determined by flow tests, bottom hole pressure tests, or any other practical method of testing wells and producing structures, and to consider such other facts and geological or engineering tests and data as may be determined by the supervisor to be pertinent or relevant

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129. Query whether if RS were to symbolize reservoir energy, would RS be the same fraction as S? The Michigan statute (§13.139 (13) (1958)) apparently anticipates that the recoverable products and reservoir energy will diminish in the same proportion all over the tract. "...and without reducing bottom hole pressure materially below the average for the pool, substantially in the proportion that the quantity of the recoverable oil and gas under such property bears to the total recoverable oil and gas in the pool, and for this purpose to use his just and equitable share of the reservoir energy..." (Emphasis supplied). Cf. N.M. Stat. Ann. 65.3.14 (a) (1953).

130. Ala. Code, Tit. 26 §179(35)D (1940).

131. La. Stat. Ann. 30:9D (1950).



to ascertaining each producer's just and equitable share of the production and reservoir energy of the field or pool."

Thus, those charged with the administration of the Alabama and Louisiana acts are authorized to use the latest scientific evidence to aid them in arriving at "just and equitable" shares. <sup>132</sup> It is likewise with Oklahoma. <sup>133</sup>

In addition to the foregoing, a number of states have declared it as legislative policy that correlative rights <sup>134</sup> are to be protected. The Alabama declaration is set forth as an example:

"In recognition of past, present, and imminent evils occurring in the production and use of oil and gas, as a result of waste in the production and use thereof and as a result of waste in the absence of co-equal or correlative rights of owners of crude oil or natural gas in a common source of supply to produce and use the same, this law is enacted for protection against such evils and for prohibiting waste and compelling ratable production."

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132. The State of Alaska's unitization statute, at §47-7-7(b) (1958 Cum. Supp.) requires adoption of scientific knowledge to arrive at a "fair, equitable, and reasonable share of the unit production..." So, "...[such share] shall be measured by the value of each such tract for oil and gas purposes and its contributing value to the unit in relation to like values of other tracts in the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on the structure, its probable productivity of oil and gas in the absence of unit operations, the burden of operations to which the tract will or is likely to be subjected, or so many of said factors, or such other pertinent engineering, geological or operating factors, as may be reasonably susceptible of determination."

133. Okla. Stat. Ann. §52-287.4 (b).

134. Ala. Code 1940 §179(24) (Cum. Supp. 1947) ; Ariz. Rev.



Stat. Ann. §27-502(A) (3) (1956); Alaska Com. Laws Ann. §47-7-6(1) (Cum. Supp. 1958); Ark Stat. Ann. §53-101 (1947); Colo. Rev. Stat §100-6-6(1) (1953); Fla. Stat. Ann. §377.06 (1957); Kan. Gen. Stat. 1949, 55-603 (1957 Supp.); Miss. Code Ann. §6132-01 (1942); N.C. Gen. Stat. §113-382 (1952); N.D. Laws 1953, Chapt. 227, §2; Okla. Stat. Ann. Title 52, §287.1; Tex. Ann. Civ. Stat., Art. 6008 §1 and Utah Code Ann. 40-6-1 (1953).





The following Chart recapitulates the above mentioned state recognition of correlative rights as the applicable doctrine in the adjustment of interests involved:

	135	136	137	138	139	140
Ala.		X	X			X
Alas.	X					X
Ariz.						X
Ark.		X	X			X
Colo.	X	X				X
Fla.		X				X
Ga.		X				
Kan.					X	X
La.			X			
Mich.			X			
Miss.		X				X
Nev.	X					
N.M.	X		X			
N.C.		X	X			X
N.D.						X
Okla.			X			X
Ore.					X	
Tex.				X		X
Utah.	X					X

135. Correlative rights defined.

136. Abuse of correlative rights tantamount to waste.

137. Just and equitable share defined.

138. Railroad Commission to adjust correlative rights in gas.

139. Administrative bodies otherwise charged with protecting correlative rights.

140. Declared legislative policy to protect correlative rights.



### Correlative Rights versus Conservation

The foregoing demonstrates the widespread blessings that correlative rights have received from legislatures. Correlative rights (including the right of capture) concern a persons liberty to do with his property as he sees fit so long as public policy in the form of rules of law does not forbid it. Placed in the milieu of the totality of conservation legislation, which forbids certain practices considered wasteful, the cause of correlative rights is fostered. This is the "Big Picture" which is an impersonal thing. Anti-waste is an acceptable thing when applied to a faceless person or one's greedy neighbor. When it comes to individual cases however, it is sometimes found that one cannot have his conservation and eat it too. Then this bundle of correlative rights is stripped of its wrapping of altruism, and the person concerned clutches its basic ingredient, i.e., his "right" to obtain a just and equitable share. This is correlative rights versus anti-waste. The outcome of this struggle was predictable, at least as far back as Ohio Oil Company v. Indiana. There, conservation stepped in to move the line of division between the oil interests and the gas interests, at the expense of the former's theretofore right to capture a "just and equitable share."

An exhaustive examination of how correlative rights have come to be redefined as a result of conservation



141

legislation is outside the scope of this paper. Some cases will perhaps suffice to buttress the suspected generality, which has been aptly put by the Oklahoma court:

"In striking a balance between conservation of natural resources and protection of correlative rights, the later is secondary and must yield to a reasonable exercise of the former."<sup>142</sup> (Emphasis supplied)

So, where fixing of gas-oil ratio plus a flat allowable resulted in penalizing 35% of the wells in the pool, the conservation order was supreme.<sup>143</sup> The court used the same language in a later case<sup>144</sup> but the result favored the correlative rights of individuals over the best conservation result. Here the struggle was between the applicant, wanting 160 acre well spacing and those resisting, who wanted 80 acre well spacing. There was evidence that the 160 acre spacing would provide 5% more ultimate recovery. In ruling in favor of the 80 acre units, it was said:

"...by any spacing other than 80 acres the rights of various owners within the area most probably would be adversely affected, if not lost entirely."<sup>145</sup>

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141. State regulation may be justified on the alternative ground of preventing waste or to adjust correlative rights. *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62(1946).

142. *Denver Producing and Refining Co. v. State*, 199 Okla. 171, 184 P. 2d 961, 964 (1947). Cf. *Application of Continental Oil Co.*, 198 Okla. 288, 178 P. 2d 880.

143. *Denver Producing and Refining Co. v. State*, *supra*.

144. *Application of Champlin Refining Co.*, 296 P. 2d 176 (Okla. 1956).

145. *Id.* at 180.



And further:

"We do not believe an 'unnecessary' well should be defined as a well an operator prefers not to drill because of the possibility of eventual exhaustion of a proven area by one, or a few wells, without consideration or recognition of the rights of others in the area."<sup>146</sup>

Texas "Rule 37" cases deal directly with the tight-rope walk between conservation and correlative rights. While conservation is to be fostered, confiscation is to be avoided. It is to be expected that both masters cannot always be served simultaneously.

Correlative rights have received a share of deference by the Railroad Commission:

"...in the numerous cases involving exception to Rule 37 brought before this court for review, the Commission has almost uniformly granted permits where deemed necessary to protect such property rights, regardless of the question of waste."<sup>147</sup>

When the action of the Railroad Commission is considered "unjust and unreasonable", or results in arbitrary discrimination between oil fields, or between different owners in the same field, they will be considered confiscatory in nature

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146. Op. Cit. supra note 144, at 180.

147. Magnolia Petroleum v. Railroad Commission, 120 S.W. 2d 553, 554 (Tex Civ App. 1938). Here if exception to rule 37 were denied, petitioner would suffer drainage disadvantage and the number of wells on his tract would not be as great as on surrounding tracts.





and may not stand. So when conservation order resulted in drainage from the plaintiffs' leases in a pool from which a larger proportion of oil had previously been recovered and where plaintiffs' leases had a much greater potential than the surrounding area, relief was granted the plaintiffs as they were considered to have been deprived of their property rights.<sup>149</sup>

Likewise, so much of the Railroad Commission's order, shutting down all wells in a certain oil field to prevent waste by flaring of casinghead gas, as shut down completely non-wasteful wells in order to protect correlative rights of all (sic) owners of lands in the field until facilities were available to market all gas therefrom, was void.<sup>150</sup>

On the other hand, correlative rights have suffered in applications of the rule concerning the voluntary subdivision of a tract after a spacing order has issued. In some cases, it appears that neither conservation nor correlative rights have been the victor and the previous spacing rule was supreme. So where plaintiff obtained one half of a tract that had been voluntarily subdivided and defendant later obtained a permit for the purpose of preventing confiscation (of the undivided tract), the plaintiff's were entitled to no equitable relief to get a portion of the oil.<sup>151</sup>

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148. *Mars v. Railroad Commission*, 142 Tex. 293, 177 S.W. 2d 941 (1944).

149. *Id.*

150. *Railroad Commission v. Rowan Oil Co.*, 152 Tex. 439, 259 S.W. 2d 173. (1953) Cf. *Thomson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, (1937).

151. *Ryan Consolidated Petroleum Corp. v. Pickens*, 155 Tex 221, 285 S.W. 2d 201 (1955).



It would seem that if a commitment of the entire tract was necessary before a permit were issued, equity would require some property interest to redound to the owners of the property without which the permit would not have been issued.

152

Another case which appears dedicated to the spacing rule itself rather than correlative rights or conservation is the Nale v. Carroll case. Here L owned .51 acres for which a drilling permit had been issued. L transferred .17 acres to the defendant. This plot contained the spot where the drilling was authorized. A small portion had also been transferred to P. D drilled on his plot and obtained a producer. L and P were unable to get a permit as the tract had been voluntarily subdivided after the spacing order. It was held that L and P had no standing to enforce an equitable division of royalties.

153

So, damnum absque injuria lives on--only this time under the aegis of the conservation age. On behalf of this brand of damnum, it is submitted that it should be objectively judged as more equitable than the anarchy which it has replaced and that it is reaching the de minimus stage.

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152. See Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So. 2d 518 (1952) and Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952).

153. 155 Tex. 555, 289 S.W. 2d 743 (1956). Cf. Humble Oil & Refining Co. v. Wrather, 147 Tex. 144, 214 S.W. 2d 112.



## The Future

Future problems concerning correlative rights will, of course, follow in the wake of scientific advancement of the industry and the answers will be etched by the combined stresses of economics and social outlook.

By a glance at the current writings on the industry, it is definitely and safely predictable that the problems of tomorrow will be more complicated than those of today. There will still be conflict or landowner A versus landowner B regarding landowner B's production practices on Blackacre. However, it is to be expected that both A & B's problems will be masked by the bigger picture and that their rights will be recast by the mold of that picture. Witness the trend of correlative rights versus conservation. Witness also the oil import problem. This is a correlative right problem on a grand scale where the "common reservoir" is the world.

154

The headlines, "Is There More Oil at Titusville",  
155  
"Palynology--New Oil-Finding Tool", "Unitization by Mail  
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Saves Time, Tempers & Money" and "New Perforating Method  
157  
Developed" reveal the simple truth that the search for  
and recovery of oil goes on in ever increasing tempo and  
scale.

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154. Oil & Gas J., Aug. 10, 1959, p. 144.

155. Oil & Gas J., July 6, 1959, p. 165.

156. Oil & Gas J., Aug. 10, 1959, p. 140.

157. Oil & Gas J., June 15, 1959, p. 68. "Western Co. last week unveiled a revolutionary new erosion method of perforating wells which it thinks may eventually put conventional jet and bullet perforating in the same class with the dodo bird."



Another headline, "World's Biggest Water Flood Nears", gives one cause to muse. The operators of Wilmington field in the Long Beach Harbor Area, under the over-all supervision of the California State Division of Gas & Oil have planned this flooding project for the dual purpose of recovering 400 million bbls. of oil and to check local land subsidence. The land has already sunk 25 feet and is continuing to sink at a rate of 1 foot per year. It is predicted that the settling would reach a total 43 feet and downtown Long Beach may settle 5 feet. Operational units are being formed along fault lines. To prevent migration from one property to another, lines of injection wells are to be drilled along common boundaries and a "wall of water" built up. It is planned to regulate the amount of water injection to keep migration from occurring. Also, the series of faults which divide the areas are expected to provide seals against oil migration as long as pressures are fairly uniform. The injection rate to stop subsidence and the injection rate to obtain the best recovery are expected to be about the same.

Suppose the gears of planning get out of mesh in practice. Problems involving correlative rights virtually bristle from such an hypothesis. The correlative rights of each operational unit, as well as the rights between units will be at stake. Is everyone going to be happy with the rate of injection of the water? Is everyone going to be satisfied that he is getting his just and equitable share

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158. Oil & Gas J., Aug 31, 1959, p. 55. See McElroy, Water Flooding of Oil Reservoirs, 7 Bay. L. Rev. 18 (1955).





and that he isn't being damaged by migration? Maybe the unit agreements have provided for solution to most of the parties thereto. But are there those (not parties to the agreement) who desire the present rate of subsidence because of some advantage to be gained by it? If so, what property interest, if any, do they have in continued subsidence?

Another thought provoking headline is: "Atomic Wastes  
159  
May Help Oil Men". The sub headline is "Radioactive waste may become future oil recovery tool."

The Texas Petroleum Research Committee, in cooperation with the Atomic Energy Commission is working on a project whereby use of radioactive wastes may be used as a means of secondary recovery. For instance, an old gas reservoir with pressure too low to be productive may be sealed off. Radioactive, gamma emitting, liquid residue with a half-life of say, 30 years, would be injected into the reservoir. The gamma ray emissions would set up a boiling cycle wherein the natural gas would be changed to usable hydrocarbons in the liquid form over the period of the half-life of 30 years. Then, it is hoped, the radioactivity would have decayed sufficiently to open the reservoir and recover the valuables.

Initial laboratory tests of the effect of radiation upon methane showed that about 24% of the methane was converted into heavy, unsaturated hydrocarbons. While this gives a measure of promise, the plan, of course, may never come to pass. But if it does, problems in the adjustment of correlative rights will reach a new dimension. All of

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159. Oil & Gas J., July 13, 1959, p. 72.



the problems attendant to the underground storage of natural

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gas, plus a few more, will likely have to be resolved.

The undisputed and uninterrupted use of the reservoir for the period of 30 years will have to be insured.

May the reservoir be taken by one group by eminent domain, under the statutes provided for natural gas storage? If not, there will be problems in long term leasing and possibly problems concerning accidental escape of dangerous substances to the damage of overlying owners. Also, the lessee will be keenly interested in seeing that the integrity of the reservoir is not tampered with. If, because of these difficulties, the legislature and courts would make eminent domain applicable, the taking of the landowner's just and equitable share and the placing an evaluation upon that share is at issue. Would the long arm of the Federal Power Commission reach to the bottom of the reservoir?

The foregoing examples are not intended to presume any insight into the exact problems and answers of the future. They may, however, serve to illustrate vistas of thought for the oil and gas lawyer who will be charged with welding and resolving rights as basic as ownership, to practices as new as creation of condensate by use of the gamma ray.

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160. See Stamm, Legal Problems in the Underground Storage of Natural Gas, 36 Texas L. Rev. 161 (1957).



## Conclusions

The development of the law concerning correlative rights was slow and laborious in the beginning. This is probably explained by the early lack of knowledge of the nature of the substances dealt with. Later with more knowledge to work with, it was still difficult to fit oil and gas into the scheme of surface property relationships already constructed. As a concomitant of this difficulty, the economic philosophy of the times was not geared to the unsuccessful and empty-handed, equities to the contrary notwithstanding. Consequently and perhaps inevitable, the convenient rule of capture was allowed to gain full head. Gross waste and inequity were its monuments. The courts were quicker to recognize the undesirable results than they were to correct them. This is probably because the difficulty of court resolution of the problems was increased in direct proportion to an understanding of their existence. It fell upon the legislatures to act--and they did. Ohio Oil Co. v. Indiana, at once recognizing correlative rights and approving them as a subject of state police power, opened the door to the age of conservation in the industry.

From then on, the doctrine of correlative rights has been a dynamic force in the resolution of the conflicting interests of entrepreneurs. The ends of protection of correlative rights and conservation are generally the same, but occasionally they conflict, resulting in compromise of the absolute protection of either.



Correlative rights are sometimes treated as a gingerbread appendage tacked on to a more fundamental structure of the rule of capture. This I challenge! The rule of capture has had its place in the basic structure of the totality of the jural relationships involved here. There it remains. The mortar is dry on the building block inscribed "rule of capture" in the architecture of correlative rights. To treat the rule of capture otherwise is to do homage to an anachronism. For a long time (and even sometimes now) it was common to see language to this effect in a case report: "The rule of capture has long been the law in this state. (cases cited) HOWEVER....." (emphasis supplied). Then the court would proceed to the real issue in the case. A more realistic and expedient approach to the issues at hand is often now found at the beginning of some Texas cases: "This is a rule 37 case."





"REGULATION OF OIL IMPORTS"

--R. O. Kellam, LCDR USN



## CONTENTS

FOREWARD	iv-v
BACKGROUND	
In General	1.
Beginning of Concern Over Oil Imports	4.
WWII and Naval Petroleum Reserves	7.
What Price Policy	10.
MID-CENTURY OUTLOOK	
Renewed Concern Over Oil Imports	14.
Crisis Again Postpones--Then Rushes Action	18.
LEGISLATIVE BASIS FOR MODERN REGULATION	
Immediate Preludes to 1955 Legislation	21.
1955 Legislation	23.
1958 Modifications	25.
VOLUNTARY PHASE OF REGULATION	
District for Administration	30.
Events Leading to Voluntary Quota System	31.
Considerations of the Special Committee to Investigate Crude Oil Imports	34.
Recommendations	36.
The System of Control	38.
Operation and Success of the Program	40.
Regulation for District V	40.



Special Committee Report of 24 Mar. '58	41.
Nine Months Appraisal	43.
Mid 1958 Reports by Special Committee	
to Investigate Crude Oil Imports	46.
VOLUNTARY TO MANDATORY--IN TRANSIT	47.
MANDATORY PHASE OF REGULATION	
Machinery of Implementing Mandatory Phase	51.
Actions Taken	51.
Recommended Control	53.
Executive Proclamation 3279 of 10 Mar. '59	55.
The Shape of Administration.	56.
SUMMARY OBSERVATIONS	65.
APPENDIX I	76.
APPENDIX II	77-88.



## FOREWARD

By this paper, it is intended to develop and record the stages of growth of the "regulation" of oil imports down to the present mandatory import quota system.

This is primarily a legal paper dealing with the legislative basis for regulation and the raison d'etre of regulation, past and present. There is no serious constitutional question involved in the validity of the legislation upon which the present regulation is based.<sup>a.</sup> The regulations appear to be lawful and

as long as there is not any arbitrary administration of them, the likelihood of mass challenge on the grounds of legality is remote.<sup>b.</sup> The evolution of oil import regulations would be sterile without a weaving in of the historic economic and political factors which have shaped the course and scope of regulation. They should therefore be referred to in any legal paper dealing with this rather unique and recent experiment in government regulation.

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a. See Eastern States Petroleum & Chem. Co., v. Seaton, 163 F. Supp. 797 (D. C. 1958).

b. See Texas American Asphalt Corp. v. Walker, 177 F. Supp. 315 (S. D. Texas 1959) and Eastern States Petroleum and Chem. Co. v. Walker, 177 F. Supp. 328 (S. D. Texas 1959). It is too early to tell for certain how litigious those who are effected will be. Gulf has recently attached the method of quota fixing of residual imports, claiming that the use of the year 1957 as a base is unfair and invalid. It is reported that Gulf plans to appeal from a summary judgment in the U.S. District Court denying relief. (Oil & Gas J., June 13, 1960, p. 66)





The writer is humbly aware that just because a lawyer uses economic and political factors in describing the evolution of a segment of regulation, he does not thereby gain the license to become an economic or political soothsayer on the subjects. Doubtless, freedom of expression allows us all a certain leeway in making oracular pretenses as critics. The temptation is great therefore, for the writer to step outside his competency and tread foolishly into economics and politics. Competency in those fields is more likely to be found in those who profess it. For those whose interest is stimulated into the fields, attention, without endorsement, is invited to:

1. De Chazeau & Kahn, Integration and Competition in the Petroleum Industry (1959).
2. Raciti, Sebastian, The Oil Import Problem, Studies in Industrial Economics, No. 6., Fordham University Press, New York, 1958.
3. Petroleum Industry Research Foundation, Inc., U.S. Oil Imports: A Case Study in International Trade, Staff Project No. 10, New York, 1958.
4. Peterson, The Question of Governmental Oil Imported Restrictions, American Enterprise Association, Washington, D. C. (1959).
5. A Message from the Corporation Commission of the State of Oklahoma about Domestic and Imported Oil, Leader Press (undated but circa early 1960)



## REGULATION OF OIL IMPORTS

### BACKGROUND

#### In General.

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The problem of oil imports has many of the almost unsolvable economic problems which are common to the imports of any commodity. The voice of legitimate pressure addressed to the governing ear must certainly leave some grave doubts as to the proper course to follow for the benefit of all the governed. Yet, the clamoring of interested groups almost dictates that some governing action be taken, whether it be for the watchmaker in Connecticut or the oil industry in Texas.

The dimensions of the considerations in the oil import problem are, however, probably broader and deeper than with other commodities. Oil not only is involved in the turbulence of America's domestic politics, 2 but it exercises a keen impact on global strategy and world politics. 3 Oil is big business and is among the 10 largest industries. 4 The year prior to the 1957 voluntary quota system of oil imports, oil imports were exceeded in dollar volume only by coffee. 5 Defense and diplomacy, both involved in the oil import equation, do not always dictate the same course of action. While

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1. For a history of the Federal Government's exercise of its powers over oil in foreign commerce see: Ely, Conservation of Oil and Gas 656-63 (1948) and Clark, The Oil Century 229-54 (1958).
  2. N. Y. Times, May 31, 1959, §11, p. 12M, col. 1-6.
  3. Id. at 14M, col. 1-8.
  4. Op. cit. supra note 2.
  5. U.S. Imports: Retarding The Inevitable, Petroleum Press Service, Sept. 1957, Vol. XXIV, No. 9, p. 322.



it is in the interest of diplomacy to foster free trade among friendly nations, it is just as urgent a requirement of defense that oil, incapable of being stockpiled, be available in sufficient quantity in the event these nations are no longer friendly.

Protection and fostering of foreign investment is also at stake.

The goals of husbanding and restricting production of domestic reserves and of providing incentive for exploration and development of still further reserves (also to be properly conserved) perhaps appear as contradictions of policy. But policies and courses of action in this field of imports are not clear cut. They rather tend to blend into the twilight of uncertainty and experiment. For example, just eight days before the Presidential Proclamation establishing a mandatory quota system for the imports of oil in March 1959,<sup>8</sup> the State Department Bulletin, in the recitation of some excerpts from the economic report of the President, alluded

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6. 60 Dep't State Bull. 308 (1959).

7. Fanning, Foreign Oil and the Free World 266-80 (1954). The statement of Oscar L. Chapman, Petroleum Administrator for Defense, made at an address before the American Petroleum Institute in 1952 is quoted in part at page 276: "...at present we do not begin to have the reserve we should have in order to provide, not absolute security, but just the minimum of security that would give us room for maneuver in the opening months of a war. Our only consolation can be that at the moment the Soviet and its satellites have much less oil than we do, only about one-eleventh in fact. But then that's a balance that could all too easily be disturbed almost overnight."

8. Proc. No. 3279, 24 Fed. Reg. 1781 (1959).





to U.S. policy of eventually eliminating trade barriers.

Prior to the imposition of the mandatory quota system, the federal government import policy was described as "pusillanimous", as abdicating to the states the determination of national supply and price, and as calling upon the large oil firms to play the role of the statesmen that the elected representatives were not

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assuming.

The sobering part of the import problem as it applies to oil

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is that this commodity is so vital to our economy and to our

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defense. While there have always been discoveries to keep

the reserves in pace with their use, there is certainly a limit

to the domestic supply. This presages that we shall become

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9. Op. cit. supra note 6. Coincidentally, this same report makes mention of the difficulty that U.S. coal was encountering in foreign markets. Coal interests, being willing to recapture some of the domestic market which has been lost to oil and natural gas, have a keen interest in oil imports.
  10. De Chazeau & Kahn, Integration and Competition in the Petroleum Industry 253 (1959). This source advocates at page 252: "...mandatory unitization for all producing pools throughout this country under federal law."
  11. In 1958, petroleum was the source of more than 45% of all U.S. energy used. Natural gas was the source of over 26%. N.Y. Times, May 31, 1959, §11, p. M13, col. 1.
  12. If, as was said by Lord Curzon, "The Allies floated to victory on a sea of oil" in WWI, they (the Allied Forces) quashed to victory in WWII. In WWII it is reported by Fanning, op. cit. supra note 7, at 267, that to operate the Air Force 24 hours, fourteen times as much gasoline was necessary as was shipped to Europe for all purposes during WWI.





increasingly more dependant on foreign oil in the future and indicates that our policy toward foreign oil until such time should proceed with caution to assure that the foreign oil is there when needed. How soon we shall need it and how much we will need are just added uncertainties in the already lengthy and fuzzy equation.

#### Beginning of Concern Over Oil Imports.

Mexico and Venezuela exported oil to the United States early in the 20th century. It was in the 1930s, however, that some concern over oil imports began to manifest itself. This was because of domestic prices and proration. With the over abundance

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13. The Compulsory Cut in U.S. Imports, Petroleum Press Service, April 1959, Vol. XXVI, No. 4, p. 126, 129: "The development of indigenous shale oil production may help to postpone the time when the United States becomes increasingly dependent on imports. But that time will certainly come." Cf. Knowles, The Greatest Gamblers 338 (1959) wherein one of the interesting results of the Pratt and Weeks researches is recited as: In the U.S., explorers have drilled one exploratory well for each 9.4 square miles of favorable land, whereas throughout the rest of the world one exploratory well has been drilled for each 1,100 square miles of favorable land.
  14. Clark, The Oil Century 229 (1958) and Hardwicke, Adequacy of Our Mineral Fuels, Annals of the American Academy of Political and Social Science, May 1952, p. 55, 62.
  15. Rister, Oil! Titan of the Southwest 315-26 (1949). See also Glasscock, Then Came Oil 307-11 (1938)



of production from the Oklahoma fields and the newly found East Texas fields to add to the supply, the wasteful prodigality of "find, produce quickly and sell at any price" begot hard fought conservation measures, such as proration and well spacing. The mere prevention of physical and economic waste through domestic conservation measures was not satisfactory to producers when the price could be held down by cheap imports. Congressmen from oil producing states objected, accusing the large integrated and foreign operating oil companies of propagandizing for restriction of domestic production in order to create a home market for cheaply produced and duty free foreign oil.<sup>16</sup> There was a clamor for high tariff or legislative quotas on imports or both. As a resulting protective measure, the Internal Revenue Act of 1932 levied a tax of ½ cent per gallon on imported petroleum, 2½ cents per gallon on gasoline or motor fuels and 4 cents per gallon on lubricating oil.<sup>17</sup> Mr. Ely suggests that this was a compromise measure and some would have imposed a \$1 per barrel tax on crude, while others would have, by quota, restricted imports to about ¼ of the 1929 and 1930 levels.<sup>18</sup>

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16. Clark, op. cit. supra note 14, at 231 reports that Congressman Garber from Oklahoma produced figures showing that oil could be delivered to the East Coast for 75 cents per barrel, compared to \$1.75 per barrel of Mid-Continent oil.
  17. Int. Rev. Code of 1932, ch. 209, §601. As a measure with the combined purposes of taxation and regulation of foreign commerce, this statute was upheld in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).
  18. Ely, op. cit. supra note 1.



At about this same time Governor Murray of Oklahoma formed the "Oil States Advisory Committee" which was generally concerned with the conservation of petroleum and the economic stresses of the industry. This Committee was the predecessor of the Interstate Compact.<sup>19</sup> Some of the governor members of the Committee solicited the aid of President Hoover to restrict imports. With Hoover's influence (and perhaps with a threat of higher import restrictions and taxes) the larger companies cooperated in a voluntary reduction in the amount of 25%, using the year 1930 as a base. This probably softened the Congressional impulse to enact strong import restrictions.

In 1933, the Petroleum Code, which was established under the National Industrial Recovery Act (NIRA)<sup>20</sup>, authorized a quota on oil imports which Mr. Ickes put into force on September 2, 1933. The calculation of the allowable imports was based upon the actual imports during the last half of 1932 and amounted to 4.5% of the daily domestic requirements.<sup>21</sup> This mandatory quota went out with the "Sick Chicken" case<sup>22</sup> but the large companies (again probably

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19. Murphy, Conservation of Oil & Gas, A Legal History 545-55 (1948)

20. 48 Stat. 195 (1933).

21. Clark, The Oil Century 239 (1958)

22. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).





mindful of the congressional temper to assist the oil producing  
states in their economic difficulties) kept the imports at  
"about the same percentages permitted under the Code."

As the '30s drew to a close, the age of conservation had  
considerable momentum. Production control by administrative  
agencies was by then the accepted rule. The year 1939 saw a  
difference in State and Federal objectives. Then, the Texas Railroad  
Commission was much concerned over the low prices resulting from  
over supply. Colonel Thompson, a dominant figure on the Commission,  
wrote and published a letter to the Governor:

"This cut [20 per cent] is wholly unwarranted...I am  
advocating to my colleagues on the Railroad Commission  
that we shut down all Texas oil fields for thirty days."

This was the same year that the Federal government by a Reciprocal  
Trade Agreement, halved the excise tax on oil imports from Venezuela,  
providing Venezuelan exports to the U.S. did not exceed 5% of the  
previous year's U.S. crude run.

#### WWII and Naval Petroleum Reserves.

World War II left the question of imports versus domestic  
production in a state of suspension. But, while World War II

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23. One manifestation of this Congressional temper was the passage of the Connally "Hot Oil" Act in 1935 which sought to assist the states in their attempts to control the amount of production. (49 Stat. 30, 15 U.S.C.A. 715 (1935)).
  24. Ely, Conservation of Oil & Gas, A Legal History 657 (1948).
  25. Davis and Willbern, Administrative Controls of Oil Production in Texas, 22 Texas L. Rev. 149 (1943).
  26. Id. at 155.
  27. Ely, op cit. supra note 24, at 658.





was a balm to the problem of domestic over-production, it was a catalyst to the problem of imports. The oil industry rose to the task demanded of it, but the drain on our resources was tremendous. For instance, from Pearl Harbor (7 December 1941) to 30 June 1946, the Defense Supplies Corporation purchased<sup>28</sup> almost 132 billion gallons of 100 octane aviation gasoline.

The Naval Petroleum Reserves had been created, commencing in 1912, with a view toward preservation in the ground of oil for the Navy's use in emergencies and military purposes. Although these reserves served their intended purpose during WWII, the occasion required more---a total mobilization of the industry. The O'Mahoney Committee, after making a 1945 survey of petroleum supply in 1945, reported that "the total estimated recoverable oil from the three Naval Petroleum Reserves, other than Alaska, is only 376,000,000 barrels. It is obvious that the amount of oil producible from these modest reserves would constitute but slight<sup>29</sup> assistance in the event of war..."

Albeit inadequate to meet the demands of total war, the idea of the Naval Petroleum Reserves (now including Oil Shale Reserves)

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28. Clark, op. cit. supra note 21, at 241. Clark also reports that the U.S. had produced 63.2% of all oil produced in the world up through 1950, having then only 26% of the world's reserves.
29. Ely, op. cit. supra note 24, at 622. Pressure for discontinuance of the Naval Petroleum Reserves has been unrelenting and sometimes successful. See, for an interesting historic account, Werner, Teapot Dome (1959). The quoted statement has since proven to be in gross error. There is now an estimated reserve of over 1 billion barrels in the Navy's Elk Hills, California field alone.



is, from the standpoint of national security, hardly assailable.

On the contrary, it has become contagious. It is now realized from the lessons of WWII that our total reserves, indeed the reserves of the Western Hemisphere, must be counted as critical for future security planning. In this milieu the Navy's policy has served as precedent for later government planning and action. In a recent

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pamphlet, such policy was declared:

"Navy's policy as to the future administration of the Naval Petroleum Reserves will be, as it has been in the past, that there shall be the maximum conservation of the oil consistent with the needs of the national security. The Navy has regarded itself as charged by Congress with the responsibility for maintaining its present holdings of oil as a reserve in the ground, insofar as that can possibly be achieved, and for restricting production to the minimum necessary to maintain the field in a state of readiness."

It is abundantly clear, from the Navy's experience, that frugality is the best way to improve ones relative position in  
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the possession of oil reserves:

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30. This pamphlet, titled "History of Naval Petroleum and Oil Shale Reserves", and prepared by the Office of Naval Petroleum and Oil Shale Reserves, is undated but contains factual data through 1 January 1959. The quotation is from page 14.

31. Id. at 15.



"The oil reserves in the Naval Petroleum Reserve No. 1 are now in excess of 25% of those on the West Coast, and this Petroleum Reserve may expect to grow in stature as the domestic reserves of oil, not only on the West Coast, but also throughout the United States, dwindle."

The Navy's stewardship, following congressional mandate, is not motivated by profit making policies. This is to be contrasted with private industry, which must profit in order to survive.

#### What Price Policy?

Thus, the U.S. oil industry was neither born nor nurtured in frugality. Reserves have been found for exploitation and not for preservation. Thus, by sharp contrast of the double edged desires of government to at once preserve our domestic oil and keep a healthy oil economy, with the absolutely essential desire of the industry to produce, whether located domestically or in foreign fields, the question of oil imports assumes riddle-like dimensions.

It is simple truth that the more imported oil we use domestically, the less we will be forced to use from our domestic reservoirs and the less oil will be available for enemy use against us in the event of war. It follows that this action would leave us more domestic oil for use in any future defense of our country. It is also good planning not to depend upon oil from foreign sources in the event of another total war. This indicates





that our domestic reserves should be in a healthy state of readiness. To accomplish this, aliunde total government control or subsidization, the industry must make profits. Profits are made only through extraction of the reserves in quantity. So, should one conclude that by using our reserves we are conserving them? By its ludicrous sound, this statement emphasizes that there are premises in the picture from the present policy standpoint other than use or non-use of domestic supply.

It has been suggested that petroleum prices wield the big stick in policy formation.<sup>32</sup> The history of the present legislative basis for mandatory import quotas, to be discussed later, gives testimony of the wedding of national security to the economic welfare of the country. This, in turn, is related to the health of the industry concerned.<sup>33</sup>

When production is regulated by the states, as it is, and geared to market demand, as it is, some results are apparent. Included among them are that oil producing states are going to follow their self-interest to maintain attractive price levels. Texas has a big share in this, producing 1 out of 7 barrels of all oil produced in the world, and 2 out of 5 barrels produced in the U.S.<sup>34</sup> For this husbandry, the industry in Texas absorbs the market effects of those states which do not so

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32. De Chazeau & Kahn, Integration and Competition in the Petroleum Industry 218 (1959).

33. See U.S. Code Cong. & Ad. News, 85 Cong. 2d Sess., 1958, Vol. 2, p. 3609 et. seq.

34. Mid-Continent Oil & Gas Association Pamphlet, Texas Oil and Gas (1959).





regulate--- at a cost to Texas operators.

That a policy which at once endeavors to satisfy protective pricing and national defense would receive criticism, is inevitable. A sharp one is:

"There is a critical need for a coordinated, consistent policy toward this vital industry. No such policy now exists: what we have instead is a patchwork of interferences, concocted and administered piecemeal, pragmatically, under a variety of influences, by a variety of governmental agencies, directed to a variety of goals--  
 36  
 none of them ever fully reconciled."

It does appear clear that from a long term standpoint, goals of a healthy domestic industry and conservation of domestic supply for a future use, cannot both be served by restriction of imports.

The divergence of opinion within the industry itself reveals that we have yet to find some agreement as to the amount of allowable imports. The majors and the independents agree upon the desirability of the nation having a continued and reasonable oil supply. They also agree that it is desirable to keep a sound domestic industry. Furthermore, they agree that some imports are needed. From that point on, opinions differ. The independents stress that their production and their profits must be such as will

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35. De Chazeau & Kahn, op. cit. supra note 32, at 228. See also, Oil & Gas J., What 8 Days Will Mean To Texans, 31 March 1958, p. 47.

36. Id. at 244.



allow them to have incentive for further search. They would have us drain all we can from our domestic reserves, even though the operation of marginal wells will mean some additional cost to the consumer. On the other hand, the majors point out that domestic oil is becoming increasingly more difficult and expensive to find and that national security in the long run, depends just as much upon development of foreign petroleum sources in order to make our domestic reserves last longer as it does upon a sound and secure domestic industry. The majors also argue that they are not out to wreck the independents for the very good reason that they desire to profit from their own domestic affiliates.

Merit can be found in the arguments of both sides. The answer which is yet to come, on just how much is the right amount of imports, lies somewhere in the areas above outlined. As will be seen later, the Federal government has arrived at an "in-between" area on policy regarding the amount of imports. This has resulted from an attempted compromise and resolution of the interests involved. Such is not uncommon in the formulation of Congressional and Executive policy. It may well be that the problem, by its nature, will not be a long-term one. With population and the demand for petroleum products on the rise, in a few years, we may welcome all of the oil imports that we are able to obtain. Moreover, if we are really serious about conservation of our domestic supply (and this has  
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been questioned ) some consideration could be given to belt

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37. De Chazeau & Kahn, op. cit. supra note 34, at 230 et. seq.



tightening measures which would be calculated to require everyone to share the expense of conservation. When, as by restriction of imports, prices are maintained or increased, the consumer is forced to bear the cost of protection, rather than share in the cost of conservation.

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#### MID-CENTURY OUTLOOK

##### Renewed Concern Over Oil Imports.

In 1944 the Federal government took stock of the drain on the domestic oil reserves resulting from WWII and sought to participate in the hastening of the development of the reserves in the Middle East. American companies holding interests abroad refused to sell stock to the U.S. and resisted attempts of the Federal government to get into the pipeline construction business. There were, however valid reasons for the United States to seek, by whatever measures "most economic and least disturbing, an increase in the American-

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38. We have paid \$15.7 billion (from 1953 to 1958) for farm subsidies, many of the products of which are surplus to our needs. (Life, Vol. 47, No. 23, Dec. 7, 1959, p. 138). If we can afford this, perhaps we can afford a subsidy for non-production by the oil producer. This, in contrast to the farm subsidy, would allow us to keep the valuable produce for future needs and allow us to trade our dollars for foreign irreplaceable resources in the meantime.

Knowledge can certainly be imputed to all of those interested, including the Federal Government, of factors such as encouragement of foreign investment and increase in domestic refining capacity, which were likely to lead to domestic oversupply in peacetime. This, in turn, was likely to lead to some demand for protection of the industry. See De Chazeau & Kahn, op. cit. supra note 34, at 218, 210, and 484.

39. Ely, op. cit. supra note 24, at 659.





controlled oil properties in the Middle East.<sup>40</sup> These  
reasons were bluntly summarized by Mr. Feis:<sup>41</sup>

"The first reason is found in the prospect that before long increased production from those properties [Middle East] will be needed to meet the world demand. The second is that those properties should be drawn upon more amply than in the past in order to reduce the prospective drain on the reserves of this hemisphere; for these reserves would be essential to the security of the United States in the event of a future crisis."

International agreement for orderly development of and equal opportunity for world petroleum was considered, proceeded to the point of having tentative endorsement by the U.S. industry, and was reported upon favorably by the Senate Committee on Foreign Relations in 1947.<sup>42</sup> Industrial support of the proposed treaty<sup>43</sup> waned, probably because of fears of federal controls over the domestic industry. The treaty was therefore never ratified.

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40. Herbert Feis, Order in Oil, 22 Foreign Affairs 616, 626 (1944).

41. Ibid.

42. Ely, op. cit. supra note 24, at 661.

43. In January 1946, the Independent Petroleum Association of America was still endorsing the treaty. Oil & Gas J., 26 January, 1946, p. 151. However with the resignation of Ickes (Oil & Gas J., 23 February, 1946, p. 108) and the lifting of price controls (Oil & Gas J., 3 August 1946, p. 56) the industry enjoyed flexing its newly freed muscles of independence. By September 7, 1946, a headline in the Oil & Gas J. at page 52 was "Oil Men Feel Time Not Ripe For Long-Range Foreign Policy."





By 1947, foreign petroleum operations were 20% owned by  
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U.S. concerns and in the same year the export-import balance  
had shifted, making the U.S. a net importer. This was occasioned  
by the unprecedented demand for petroleum products in peacetime.  
One Senator proposed an immediate embargo on oil exports and a  
Congressman declared:

"...the progressively increasing demand for petroleum in  
the United States and Europe, and the reliance which hith-  
erto has been placed on greatly expanded petroleum prod-  
uction in the Middle East in supplying this growing de-  
mand in both continents, makes imperative a complete  
review of the degree of confidence which we justifiably  
may have in imports and foreign reserves, under changing  
political conditions."  
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So while there was both official and industrial concern over  
imports at the mid-century, there was by no means a unanimity of  
method of approach. Official thinking was "obsessed" by alarm at  
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the prospect of imminent shortage, while the industry was  
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concerned with meeting increased demand for oil and for protection.

So with some wanting controls on exports, others wanting more  
stringent import controls, and as many as nine federal agencies  
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working on National Oil Policy at one time, it is understandable

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44. Oil & Gas J., December 20, 1947, p. 42.

45. Oil & Gas J., January 29, 1948, p. 138.

46. World Oil, July 1949, p. 29.

47. Ibid.

48. Oil & Gas. J., March 31, 1949, p. 55.



that the report of the National Petroleum Council, an advisory body to the Secretary of the Interior would attempt to gather all under its umbrella of announced policy:

"The nation's economic welfare and security requires a policy on petroleum imports which will encourage exploration and development efforts in the domestic industry and which will make available a maximum supply of domestic oil to meet the needs of the nation.

"The availability of petroleum from domestic fields produced under sound conservation practices, together with other pertinent factors, provides the means for determining if imports are desirable to supplement our oil supplies on a basis which will be sound in terms of the national economy and in terms of conservation.

"The implementation of an import policy, therefore, should be flexible so that adjustments may readily be made from time to time.

"Imports in excess of our economic needs, after taking into account domestic production in conformance with good conservation practices and within the limits of maximum efficient rates of production, will retard domestic exploration and development of new oil fields and the technological progress in all branches of the industry which is essential to the nation's economic welfare and



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security."

The headline, "Washington Hopes for Agreement on U.S.

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Oil Imports" is a most eloquent summation of the foregoing quotation. The more responsible segment of the oil industry desired that the large importers exercise temperance, having in mind the alternative---the establishment of a quota system and the embryo of government control. The larger importers exercised restraint in 1950 and cut down their scheduled shipments for the  
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year by a total of 70,000 barrels daily.

Crisis Again Postpones--Then Rushes Action.

Any further attempts to juxtapose the desires to keep our oil and use it too into a workable long term policy was temporarily suspended by the Korean conflict--and later influenced by the Suez crisis. Both events tendered obvious lessons of history for those willing to accept. Korea and Suez both demonstrated U.S. political maturity and global responsibility. Both demonstrated that our oil is available for use at present when called upon. Suez was later to demonstrate that foreign oil supply to the U.S. and friendly Europe is, at best, at the mercy of the changing complexion of cold war.

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49. Clark, The Oil Century 246 (1958).

50. World Oil, March 1950, p. 41: "Congressional subcommittees will continue to study the subject, but if the oil industry can meet the situation by voluntary action, it will be a relief to many members and to some if not all administrative agencies."

51. Ibid.





In January 1951, President Truman formed the Materials Policy Commission. About 18 months later the report of the Commission's study, described as "one of the most exhaustive studies ever made<sup>52</sup> of the problem of strategic materials for defense" was released. The report was no prophecy of doom, but was a frank prediction of progressive inadequacy of petroleum to satisfy future domestic energy requirements. The 1975 demand for petroleum is expected to be more than double the 1950 demand in the U.S. In other parts of the free world, the demand is expected to be three and four times as<sup>53</sup> great as in 1950.

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The tonic of new discoveries after Korea allowed the continuation of the study of the problem of oil imports in an atmosphere of deliberativeness rather than panic. So it was when President Eisenhower in July 1954 appointed the Committee on Energy Supplies and Resources to broadly examine all factors pertaining to U.S. energy and resources "with the aim of strengthening the national defense, providing orderly industrial growth, and assuring supplies for our expanding national economy

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52. Fanning, Foreign Oil and The Free World 274 (1954).

53. See the President's Materials Policy Report, "Resources for Freedom", Vol. III, June 1952.

54. Fanning, op. cit. supra note 52, at 277. In May, 1953, twenty new fields in Texas were discovered, bringing the year's total to 266 in the State. This was an increase of 62 fields over the previous year.



and for any future emergency."<sup>55</sup> With no immediate emergency in sight, it is not surprising that one of the uppermost and most insistent cries that occupied the Committee's mind was that penetrating rhetorical outburst made by E. O. Thompson, Railroad Commissioner of Texas, when said, in hearings before the House Committee on Interstate and Foreign Commerce: "How can a Texas twenty barrel allowable complete with a five thousand barrel well?"<sup>56</sup> In addition, the demands of the coal interests for import restrictions, the concern of Venezuela and Canada, and the desire to build up Western Hemisphere petroleum supply facilities and vital reserves, thickened the porridge. It is no wonder that Mr. Fanning declared, "There is no easy answer to the import problem--no more so than there is to the

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55. Ibid.

56. Id. at 244.



entire question of foreign oil and the Free World."

#### LEGISLATIVE BASIS FOR MODERN REGULATION

##### Immediate Preludes to 1955 Legislation.

Soon after Congress met in 1955, on 26 February, the White House released the report on energy supplies and resources policy.

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The Committee had concluded that in the interests of national security, imports of crude and residual oils should be kept in

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57. Fanning, op. cit. supra note 52, at 278. One might wonder, in the consideration of this entire question, why more emphasis is not placed on exports. An embargo on exports (see text at note 45) as well as restriction upon imports would aid in the desired end of husbanding our reserves for domestic use. It is to be expected that restrictions upon imports will reflect upon exports in that the less we import the easier it will be for domestic producers to find profitable domestic markets. The record since 1958 bears this out, showing a decline in exports. In 1958 we exported 276,000 b/d. The estimate for 1960 is 230,000 b/d. (Oil & Gas J., Jan. 25, 1960, p. 173). Most of this 1960 amount, 224,000 b/d, is expected to be in products rather than crude. In addition, examination of the legislative basis for modern regulation, infra, p. 23 shows unmistakably that the dominant forces in policy formation are primarily concerned with protection of a healthy industry. This means encouragement of discovery and production from domestic reserves. Disposition of the product, so encouraged, has been of secondary importance. Since national security depends upon possession and use of these same reserves, it is difficult to reconcile how a healthy industry will preserve national security (see Sen. Douglas' views on this problem in general, infra, p. 29). The reconciliation involves a gamble on timing and total availability of reserves for the free world. If we seriously deplete our reserves in order to keep the industry healthy until "X" day when domestic demand will overtake supply, then we may win the battle of a healthy industry, to the detriment of our national security. In the meantime, it appears that exports will, to the extent they contribute to a "healthy industry", be involved in the same gamble.
58. This is the Cabinet Committee that President Eisenhower appointed the previous July. See text at page 19.





balance with the domestic production of crude oil at the  
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proportionate relationships that existed in 1954. This  
was around 10% imports----90% domestic.

As a result of this Committee's study, the importing  
companies were requested to restrict imports of petroleum to  
the United States on a voluntary, individual basis in conformity  
60  
with the policies enunciated by the Committee. The over-  
riding concern of the Committee was "inadequate incentive for  
exploration and the discovery of new sources of supply" which  
it believed, would be detrimental to the future demands of civilian  
61  
use and national defense.

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59. For text of this portion of the Energy and Resources Report, see Oil & Gas J., March 7, 1955, p. 85. This being a cabinet committee, agreement was reached as to the broad policy on imports without any statement of opposition. This is not to say that the way was clear to all or that there was general agreement. The hearings on the Trade Agreements Extension Act developed the traditional "foreign policy versus domestic producers" conflict of opinions. The General Agreement on Tariffs and Trade (GATT) also came under sharp criticism.
60. In editorial comment on the report, World Oil, April 1955, p. 29 declared: "The chief value of the reports lies in bringing out clearly the issue between those who believe that the national welfare is best served by preserving freedom of initiative to the individual and holding necessary controls so far as possible to local levels and those who favor the continuous extension of government control and management over industry."
61. Oil & Gas J., March 7, 1955, p. 85. Just the week before, in the Oil and Gas J., February 28, 1955, pp. 82-83, the headlines were, "Import Estimates Rising", and "Imports Hit All-Time High."





The immediate preludes to the passage of the 1955 amendment to the Reciprocal Trade Agreements Act (Trade Agreements Extension Act)<sup>62</sup> were: (1) Senator Neely of West Virginia<sup>63</sup> demanded an arbitrary limitation of imports to 10% of demand , (2) Standard Oil of New Jersey indicated that it would hold its imports down, based on a 1954 ratio, and Gulf agreed to go along "so long as other importers do likewise"<sup>64</sup> , (3) the I.P.A.A.<sup>65</sup> backed the Neely amendment , (4) the State Department opposed the Neely amendment as the Department "saw no evidence that either [coal or oil] has...suffered from imports...as to justify the junking of the historic policy of permitting freedom of enterprise..<sup>66</sup> .."<sup>67</sup> , (5) more all-time highs in imports were noted<sup>68</sup> , with another trim in the Texas allowable<sup>68</sup> , and (6) Congress, exercising political wisdom, indicated a penchant to frame legislation in such a fashion as to put the responsibility upon the Executive<sup>69</sup> branch to determine when and how much to restrict oil imports.

#### 1955 Legislation.

The amendment that was to become applied in the restriction<sup>70</sup> of petroleum imports was:

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- 62. Trade Agreements Extension Act, ch. 169 §7, 69 Stat. 166 (1955).
  - 63. Oil & Gas J., March 21, 1955, p. 122.
  - 64. Id. at 123.
  - 65. Oil & Gas J., April 4, 1955, p. 106.
  - 66. Oil & Gas J., April 18, 1955, p. 111.
  - 67. Oil & Gas J., April 25, 1955, p. 82.
  - 68. Id. at 98.
  - 69. Oil & Gas J., May 2, 1955.
  - 70. Trade Agreements Extension Act, ch. 169 §7, 69 Stat. 166 (1955).



"(b) In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security."

It should be noted that the words of the statute avoid the issue of how much imports will threaten to impair the national security. Impairment of national security is clearly the evil legislated against, but it was still unclear as to exactly what gave rise to the evil.

For those interested in strong protection, the evil was foreign competition, "and [it was] adverse to the national



interest, economy, security, and independence." <sup>71</sup> And, in spite <sup>72</sup>  
of the language of the bill quoted above, it was hotly declared:

"There is not one word guaranteeing any American market  
or supplier against suffocation by foreign imports. There  
is not one word in this bill that offers real safeguards  
from cutrate foreign competition to any American  
employed in a domestic industry or whose dollars are  
invested in America...."

This 1955 amendment was never called in to use to require any  
restriction upon imports. How much of a deterrent, if any, it was  
to those who would break away from the "voluntary" import quota  
system, is a matter for speculation. Administration of the  
import program, during this phase of "regulation" will be treated  
in more detail later.

#### 1958 Modifications.

The Trade Agreement Extension Act of 1958 contains present

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71. Statement of Senator George W. Malone of Nevada, U.S. Code  
Cong. & Ad. News, 84th Cong., 1st Sess. 1955, Vol. 2, p.  
2111. In spite of statements like this which tend to place  
all or most of the ills on the oil industry upon imports,  
one should not be unmindful that the flattening of demand  
for petroleum is the real problem in the U.S. industry.  
If imports were entirely shut off, there would still be  
too much oil. World Petroleum, June. 1960, Vol. 31, No. 6,  
p. 5.
72. Id. at 2115.





legislative authority for regulation of imports. Existing law is strengthened by a requirement that no action shall be taken to decrease the duty on an article if the President finds such reduction would threaten to impair the national security.<sup>74</sup>

Under the 1955 amendment, the onus was upon the President to cause an investigation if he were advised that some article was being imported into the United States in such quantities as to threaten to impair the national security. Now, the Director of the Office of Defense Mobilization (name has been changed to "Office of Civil and Defense Mobilization" and for purposes of brevity will hereafter be referred to as "Director") does the investigation upon his own motion or upon request of some other governmental agency. If then, he believes that the national security is being impaired, he is enjoined to so advise the President. At that point, the President is required to take the needed action unless he finds that the imports of the article are not in such quantities which would threaten national security. The act does not say whether the President would cause another investigation. Presumably he could reject the advice of the Director without an investigation---but this, being an impolitic move, is not likely to occur.

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73. 72 Stat. 673 (1958), 19 U.S.C.A. 1352 a (a), (b), (c), (d) and (e). This modification was brought about at the insistence by some that imports were still too high. See Oil & Gas Journals, May 12, 1958, p. 81; May 19, 1958, p. 99 and May 26, 1958, p. 59.

74. 72 Stat. 673 (1958), 19 U.S.C.A. 1352 a (a).



The addition of subsection (c) gives some criteria for the Director and the President to go by, "without excluding other relevant factors."<sup>75</sup> They are enjoined to give consideration to:

- (1) domestic production needed for projected national defense requirements
- (2) existing and anticipated availabilities of resources essential to the national defense
- (3) growth requirements and stimulation necessary to assure such growth
- (4) how imports will affect the foregoing.

The Director and the President are also required to recognize the close relation between economic welfare of the nation and national security and to consider foreign competition versus: (1) economic welfare of individual domestic industries, (2) substantial domestic unemployment, (3) decrease in government revenues, (4) loss of skills or investment, or (5) "other serious effects."<sup>76</sup>

From the foregoing, a burden of highly skilled, if not impossible, omniscience has been placed upon the Director and President. The

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75. 72 Stat. 673 (1958), 19 U.S.C.A. 1352a (c).

76. Ibid. The remaining added subsections relate to publication of reports and reports to Congress.



record clearly shows that Congress, the fact finder and policy maker has not been able to synthesize all of the ingredients of the problem into a workable formula. A part of Senate Report 77 1838 of July 15, 1958 tacitly admits as much:

"A great deal has been said about the large numbers of workers dependent on foreign trade but the committee was unable to uncover any information as to the overall displacement of workers as a result of imports....In the meantime, there is convincing evidence that in certain areas, in segments of vulnerable industries, and across the nation as a whole, excessive imports have caused unemployment and other wise weakened the economy which is in itself a vital part of our national security...."

Since this burden involves the task of continual resolution of relative values, it is to be expected that the debate from interested sources will require frequent re-evaluation of any action taken. So if a decision is about to be reached to restrict imports to a certain percentage figure which will permit more imports than before, it follows that those adversely effected will make their position known. While this will undoubtedly cause some illumination upon the path of policy, one might wonder whether "national security" will become highly colored

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77. U.S. Code Cong. & Ad. News, Vol. 2, 85th Cong., 2d Sess., 1958, p. 3620.



by definition from the loudest and most insistent groups seeking a particular brand of economic welfare.

In this respect, the individual views of Senator Douglas, in opposition to this so called "National Security Amendment",  
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are of interest. He foresaw the national security amendment as subject to abuse in order for special tariff treatment.

He saw in the amendment an "implicit syllogism", which is:

- (1) The economic welfare of the country affects national security.
- (2) Any industry which is injured by imports weakens the economic welfare of the country.
- (3) Therefore, injury to a domestic firm or product, or unemployment, or a decrease in Government revenues, loss of skills or investment, affects the national security.

Senator Douglas listed some industries which have sought escape-clause relief in the past (special tariff protection), and which he believed could now seek relief as national security industries.

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He listed about 50 items , among them: spring clothespins, glaze cherries, pregnant mares urine, rosaries, red fescue seed, hatter's fur, ferrocerium (lighter flints), watches, and bicycles.

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78. Id. at 3630.

79. Op. cit. supra note 77, at 3631.





In short, he was opposed to expansion of protection. Protection, however, is precious to those who have it, and who want more of it.

#### VOLUNTARY PHASE OF REGULATION

##### Districts for Administration.

In order to deal with the events leading to the establishment of the voluntary phase of regulation, "Coordination Districts" have been set up. These Districts are now divided, for the purposes of administration, into two categories. These are Districts I-IV and District V. The former Districts (composed of all the States with the exceptions of the West Coast States, Nevada, Arizona, Alaska and Hawaii) have a substantial production capacity which is in excess of actual production. This is largely because of the control of State regulatory

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80. The Dallas Morning News, Dec. 5, 1959, §1, p. 8, col. 4 reported that Senator Yarborough of Texas declared: "Congress should act to protect our valuable domestic petroleum industry, its employees and our federal, state and local governments....We need a stronger basis for the control of oil imports than this [referring to the mandatory quota system]."

Incidentally, the Joint Committee for American-Flag Tankers and the Committee of American Tanker Owners, Inc., now want protection from the Office of Civil and Defense Mobilization. Their desire is for a regulation requiring that 50% of all oil imports be carried in U.S.-flag tankers. The tankers interests' argument is that without such protection they could not compete with foreign tankers and that such a result adversely affects national security. Oil & Gas J., January 25, 1960, p. 130.



commissions. On the other hand, District V, which is composed largely by California oil fields, does not have production control as in Districts I-IV. Production is declining steadily and imports are necessary to meet demands. Furthermore, the separation of these two categories is such that transportation from Districts I-IV to District V is difficult. This situation was improved in 1958 by additional pipeline capacity from Texas and Oklahoma to the West Coast.

#### Events Leading to Voluntary Quota System.

The policy of voluntary restriction worked reasonably well until  
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about the middle of 1956. This voluntary restriction was the type wherein the importing companies were requested to keep their crude imports within the 1954 production ratio. This ratio was slightly in  
83  
excess of 10%. The Special Committee to Investigate Crude Oil Imports (a blue ribbon committee composed of the Secretaries of the Departments of State, Defense, Treasury, Interior, Labor, and Commerce) found, however, on the basis of schedules submitted to the Office of Defense Mobilization that there was scheduled a sharp rise in imports for the last half of 1956 and 1957. The following table, taken from the Report of Special Committee to Investigate Crude Oil Imports, 29 July 1957, reveals the imports by categorized Districts and the progression of the percentage ratios of imports to production:

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81. Report of Special Committee to Investigate Crude Oil Imports, 29 July 1957 (no pagination). For a map of the Districts, See Appendix I.

82. Ibid.

83. The ratio for all imported petroleum products was in excess of 16%.



Percentage Ratio of Crude Oil Imports to U.S.  
Crude Oil Production

(In Thousands of Barrels Daily)

			1st half	3rd quarter	4th quarter	2d half
	<u>1954</u>	<u>1955</u>	<u>1956</u>	<u>1956</u>	<u>1956</u>	<u>1957</u>
<u>Districts I-IV</u>						
Imports	605	689	735	830	718	971 <sup>(1)</sup>
Production	5367	5835	6199	6155	6212	6079 <sup>(2)</sup>
Percentage Ratio	11.3	11.8	11.9	13.5	11.6	16.0
<u>District V</u>						
Imports	51	93	153	212	198	275 <sup>(1)</sup>
Production	975	972	967	959	949	923 <sup>(2)</sup>
Percentage Ratio	5.2	9.6	15.8	22.1	20.9	29.8
<u>Total U.S.</u>						
Imports	656	782	888	1042	916	1246 <sup>(1)</sup>
U.S. Production	6342	6807	7166	7114	7161	7002 <sup>(2)</sup>
Percentage Ratio	10.34	11.5	12.4	14.7	12.8	17.8

(1) The importing companies in filing reports with the Office of Defense Mobilization estimated that their imports into District V for this period would be 296,000 barrels per day. There is reason to believe, however, that these imports will not exceed 275,000 barrels per day and, as a result, this figure is being used throughout the report.

(2) Estimated, Office of Oil and Gas, Department of the Interior.





It will be seen from the foregoing table that imports increased only slightly in Districts I-IV in 1955 and the first half of 1956. This brought the ratio up to 11.9%. There was a sharp rise in the third quarter of 1956 to 13.5%. The drop in the fourth quarter may be attributed to Suez. After Suez opened, the schedules filed rose, as may be seen, to 16%.

The rise of imports and planned imports in District V was even more pronounced, going from 5.2% to a projected 29.8% for the second half of 1957.

The Under Secretary of State, Herbert Hoover, Jr., was, in June 1956, reflecting the country's diplomatic viewpoint in declaring that discriminatory measures, quotas, and governmental regulation, were not favored by the administration. Quotas were described as placing "shackles on an industry whose dynamic qualities should be fostered rather than hampered." He also warned that quotas would ultimately lead to governmental price fixing and further controls. Mr. Hoover received a hot rejoinder, reflecting clearly that all were not so frightened of Government control. The Independent Petroleum

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84. Op. cit. supra note 81.

85. Clark, The Oil Century 247 (1958). Clark's source is from a speech delivered at the 1956 mid-year meeting of the Interstate Oil Compact Commission, held in Dallas, Texas.

86. Ibid.

87. Id. at 248. Mr. Warwick M. Downing, Colorado's representative at the meeting declared, inter alia, "Free enterprise has never meant that business should be free of Governmental control...."



Association of America (IPAA) indeed asked for control. On August 7th, they asked that action be taken under the portion of the 1955 Trade Agreements Extension Act quoted above.

After receiving the request of the IPAA, the Director of Defense Mobilization caused a public hearing to be held from October 22-24, 1956. As the hearings were held, imports were showing gains. No action was taken immediately, but the Director declared that, but for the Suez crisis, he would have no course but to make a certification under the Trade Agreements Extension Act of 1955 that projected import plans constituted a threat to national security.

Considerations of the Special Committee to Investigate Crude Oil Imports. The facts of rising imports are recorded in the above table. The Committee considered that there was a direct relationship between the nation's security and available sources of energy. Not seeing any immediate replacement for oil and gas, which accounts for 2/3 of consumed energy in the U.S., available supplies were considered important.

The crux of the Committee's rationale was that a limitation of imports will tend to insure a "proper balance" between imports and domestic production.

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88. See text at note 70.

89. Op. cit. supra note 81.

90. Oil & Gas J., October 29, 1956, p. 77.

91. Op. cit. supra note 11.

92. Op. cit. supra note 81.



The Committee rejected a plan of importing foreign crude into the U.S. and storing it within completed fields or elsewhere, as being too costly and as presenting too many physical problems. Also rejected was a course of action that would enlarge government participation in exploring for oil reserves which would be shut in as reserves. This, too, was considered too costly and "contrary to the principles of free enterprise which characterize  
93  
American industry."

Outright encouragement of increased imports in order to conserve domestic reserves was rejected as unsound. It was believed that this:

- (1) Would result in a flow of foreign oil which was in excess of the quantities needed to supplement domestic supply.
- (2) Would discourage and decrease domestic production.
- (3) Would cause a marked decline in domestic exploration and development.
- (4) Would, because of the time lag between exploration and production, leave the nation years away from the attainment of any emergency supply of fuel.

The Committee declared that it had considered the foreign policy aspects of limiting petroleum imports, as well as the interests of domestic consumers. The impact of restricted

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93. Ibid.



imports on the later group was rationalized by declaring that excessive reliance on the low cost imported oil may put the consumer in a long-term vulnerability of facing a shortage and possible unavailability.

Recommendations. In view of the foregoing, it was recommended, commencing the last half of 1957 and the first half of 1958, that all large importing companies who were importing into Districts I-IV cut back imports to 10% below their average for the years 1954, 1955 and 1956. Small importers (those who had imported less than 20,000 barrels per day in 1954) were not asked for percentage cuts, but were requested to import as per submitted schedule, and in any case, not to exceed 12,000 b/d<sup>94</sup> over their 1956 imports.

No requested restrictions were recommended for District V at this time as the level of imports was considered to be within the difference between market demand and domestic production. It was planned, however, to review the District V situation in about six months and the entire situation every year, at least.

The overall requested restrictions were calculated to maintain a ratio between imports and domestic production of about 12%, or between imports and domestic demand of about 9.6%.

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94. Op. cit. supra note 81.





Provision was made for fitting new importers into the total scheme. It was recognized that the plan might be circumvented by the transfer of allotments, oil sale and product purchase agreements, and by importation of products rather than crude, so the Office of Defense Mobilization was enjoined to observe the situation. It was recommended finally that the Department of the Interior, under policy guidance from the Office of Defense Mobilization, administer the plan.

The foregoing recommendations were put into effect on 29<sup>95</sup> July 1957. Interior Secretary Fred A. Seaton requested and obtained the services of Captain Matthew V. Carson, Jr., U.S.<sup>96</sup> Navy, to administer the program.

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95. White House Memorandum for Secretary of the Interior and Director of the Office of Defense Mobilization, 29 July 1957. It is interesting that this plan would be put into effect when the analysis of the problem and the answer to it was slanted differently by the English trade newspaper, Petroleum Press Service, in an article titled, "Lagging U.S. Reserves", (Vol. XXIV, No. 5, May 1957) it was pointed out that "merely to maintain the present ratio between U.S. domestic production and reserves, and between production and imports in the period up to 1965, for example, would require an average annual rate of gross additions to proved reserves about 50% higher than in recent years." (p. 169) It was generally concluded that rising imports would be needed.
96. Capt. Carson was once counsel and Director of the Office of Naval Petroleum Reserves.



### The System of Control.

As has been seen above, the goal of restriction based on the 29 July 1957 recommendations (which were adopted by the President on the same day) was not to roll back imports to a figure pegged on the 1954 imports, but to take into the account all imports for the years 1954, 1955 and 1956 in fixing the import quota.

The recommendations represent an important step in definition of the proper balance between imports and domestic security and in definition of the point where imports begin to effect national security. A judgment was reached that 17.8% of imports to crude oil production (in all Districts) was too much in the way of imports. This was to serve as a starting point and as precedent for the same type of administrative judgments that were to be made when the program became mandatory. Although what transpired during the voluntary system of control will not be legally binding upon what will transpire under the mandatory program, the voluntary system of control afforded a good opportunity as a proving ground of what was reasonable in the way of restriction. That is to say, if controls were reasonable enough to beget cooperation under a voluntary program, the same area of reasonability, with its defined periphery, would likely be "reasonable" in a legal sense in the administration of a mandatory program.



Based upon the evidence of records and schedules and submitted by the established importers, allowed imports for each, expressed in thousands of barrels daily and calculated upon the formula that was applicable to Districts I-IV, were set up. For example, Sinclair was found to have a 3 year average of 69.1 thousands of b/d. The imports per formula were thus 69.1 minus 6.9 or 62.2 thousands of b/d. The new and small importers were treated in the manner as recommended.

No sanctions were provided for refusal to comply with the allowed imports. The desire of the industry to stay as free as possible from control, plus whatever patriotic suasion was generated by the knowledge that imports had been found to pose a threat to national security, were expected to achieve cooperation. Lacking cooperation, the program would never have gained headway.

At the outset, provision was made to hear appeals of those companies who claimed inequitable treatment and Captain Carson received initial encouraging information from most companies, indicating their willingness to participate.

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97. See text at page 36, supra.

98. Oil & Gas J., August 19, 1957, p. 97.

99. Oil & Gas J., August 12, 1957, p. 71. Sun Oil Company said flatly that it was afraid of anti-trust laws and would not comply. Others failed to state specifically what they intended to import.





Forms, the sine qua non of the regulators and the bane of the regulated, were prepared for obtaining records of each company's actual monthly imports and planned imports. Effective April 1958, certificates of compliance were issued to importing firms. An importing firm was not in compliance if it exceeded its established allocation in any 3 consecutive months.

Even though the program was from the outset called "voluntary", it was realized by all concerned that the overtones of compulsion were present. For instance, all of the results of the program were to be published. Thereby a "violation" would be made known to the public. Further it was realized that statutory machinery was available to be called in to assist in requiring instead of requesting, by the same agency that was then requesting. The IPAA had no illusions about the program being completely voluntary. 100

#### Operation and Success of the Program.

Regulation for District V. It will be recalled that, by the recommendations of the first report of the Special Committee to Investigate Crude Oil Imports, no restrictive action was called for in District V. However, this Committee reappraised the

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100. Oil & Gas J., August 12, 1957, p. 74. See also, Oil & Gas J., July 22, 1957, p. 47, wherein it was stated that the voluntary program would be "backed up by the gun of public opinion and the threat of government enforced quotas...."



situation as they indicated they would, in December of  
101  
1957.

They found that the programmed imports for the first half of 1958 were 348,800 b/d. This was upon the basis of information submitted to the Administrator, Captain Carson. It was also found that the deficit between production and estimated demand was approximately 220,000 b/d. This required a reduction of 37% of programmed imports. It was recommended, as before with Districts I-IV, that the cuts be made on a percentage ratio of previous imports. For the majors in District V, this amounted to 15% of the 1956-57 daily average. The small and new importers were also given special treatment in District V.

The Office of Defense Mobilization and Department of Interior were cautioned to watch for indirect non-compliances with the recommended formulae. The President directed all the recommended  
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action to be placed into effect.

103  
Special Committee Report of 24 March 1958. This re-  
port was a review of the voluntary plan to date and was again

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101. Report of Special Committee to Investigate Crude Oil Imports, December 12, 1957 (no pagination).
  102. White House Memorandum for the Secretary of the Interior and the Director of the Office of Defense Mobilization, December 12, 1957.
  103. This report is titled "Supplemental Report" of the Special Committee to Investigate Crude Oil Imports, March 24, 1958.



concerned with Districts I-IV. The Committee found that all but three "substantial importers" had complied with the voluntary program, and that in a number of instances, companies<sup>104</sup> did not import the full amount of their assigned quotas.

Keeping of the voluntary program was recommended. It was noted that the industry had not yet bounced back from the post Suez let down. The original 12% ratio of imports to production<sup>105</sup> was kept, with a resulting 8% required cut in current imports.

The Committee noted that it had anticipated that new importers could be accommodated without curtailing the established importers. This was because of an expected increasing rate of production. Production having declined, it was announced that established importers would have to "move over" to provide for<sup>106</sup> these newcomers.

As a measure to strengthen the voluntary program, it was recommended that the provisions of the Buy American Act<sup>107</sup> be incorporated in the procurement contracts of all agencies of<sup>108</sup> the government purchasing petroleum under contract. This, then, was a tacit admission that some help was needed to acc-

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104. Id. at 1.

105. Oil & Gas J., March 31, 1956, p. 50.

106. Id. cit. supra note 103, at 3.

107. Buy American Act, 41 U.S.C. §10a-10c (1933), as amended 41 U.S.C. §10d (1949).

108. This was implemented by Executive Order 10761 of 27 March 1958, 23 Fed. Reg. 2067 (1958). So anyone selling petroleum products to any agency of the United States had to agree to the following provision: "The contractor agrees that during the contract period he will comply in all respects with the Voluntary Oil Import Program."





omplish the aim of restricted imports.

The recommendations of the Committee were approved by the  
109  
President on 25 March 1958.

The program was undergoing obvious stress, but had managed to hold together. Congress was in session and some wanted  
110  
stronger import controls. Further, the industry was not as  
111  
healthy economically as had been expected.

Nine Months Appraisal. The dual headlines of "Tough Import Plan Fading in Congress"  
112  
and "Voluntary Import Plan  
113  
97% Effective" had obvious kinship. That is to say, the success of the voluntary program was a large factor in the avoidance of congressionally fixed, arbitrary and mandatory quotas. This, coupled with probably congressional unwillingness to tackle a factually and politically tough problem resulted in the 1958 legislation which put the burden on the  
114  
Executive to do the restricting.

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109. White House Memorandum for the Secretary of the Interior, March 25, 1958. For the tabulated effect of the recommendations as they pertained to each company, see Oil & Gas J., March 31, 1958, p. 51.
110. Oil & Gas J., May 5, 1958, p. 75.
111. U.S. Oil Makes Heavy Going, Petroleum Press Service, March 1958, Vol. XXV, No. 3., p. 84, 85: "The essence of U.S. producers' present difficulties lies in the extent to which they have over-extended their productive capacity, some of which though profitable, is quite uneconomic when measured against imports."
112. Oil & Gas J., May 5, 1958, p. 74.
113. Id. at 75.
114. See text at page 28, supra.





The Administrator, Capt. Carson, was apparently pleased with the 97% effectiveness of the program and complimented the complying companies for their "business statesmanship." Two of the three leading companies who had failed to previously comply with the program appeared ready to stay within the quotas set by the formula. Only one persisted in the disregard of quotas. This importer, Eastern States Petroleum and Chemical Corporation, had contracted for more foreign oil than its officers had requested quotas for. Apparently, being unable to replace a lost Japanese sales outlet, the Company was caught with an excess of imports. While trying to arrange for a market, the Company put its excess in bonded storage in accordance with the Customs rules. When it found itself in non-compliance with the program (after it had no more storage available), the Company also found itself in the position of losing two government contracts and the loss of future government contracts because of the President's Executive Order which brought the Buy American Act in to support the voluntary oil import program.<sup>115</sup> The Company, unsuccessful in its attempts to have the quota revised through the appeals procedure to the Administrator, attacked the legality of Executive Order 10761 of 27 March 1958, as well as the propriety of the action of the Administrator in refusing a revised quota. The District Court

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115. See text at notes 107 and 108.



first dismissed Eastern's motion for preliminary injunction, finding that the Executive Order was lawful both under the Buy American Act and under the Government's power to buy from whomever it pleased.<sup>116</sup> The Court of Appeals of the District of Columbia reversed, as the tendered issue of the arbitrary action in the implementation of the Voluntary Oil Import Program should have been considered.<sup>117</sup> This was considered later, and the Administrator's refusal was specifically found to be not so arbitrary as to warrant a preliminary injunction against the government to restrain cancellation of government procurement contracts. While a hardship undoubtedly existed, the administrator had apparently determined that such had arisen as a result of the company's business judgment and private contractual difficulties. Upon a short review of the facts of the case, the court found that there was "ample evidence" to sustain the Administrator.

It is difficult to see how the action of the Administrator could have been otherwise and also consistent with a fair policy toward all importers. If internal difficulties of an importing company were to serve as a springboard for preferential treatment,

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116. Eastern States Petroleum & Chem. Co., v. Seaton, 163 F. Supp. 797 (D.C. 1958).

117. Eastern States Petroleum & Chem. Co., v. Seaton, 165 F. Supp. 363 (D.C. 1958). For a related case concerning Eastern's attempt to test taxation statute on oil imports, see Eastern States Petroleum Corp. v. Rogers, 265 F. 2d 593 (D.C. Cir. 1959).



an equitable allocation among all would soon be a thing of the past. The judgment of the court is therefore considered sound. In reaching such a conclusion, one must not be unmindful of the very real hardship that must have been placed upon Eastern which endeavored, apparently as long as it could (and consistently with its contractual arrangements) to comply with the program. Hardship, however, is not unusually a predicate of regulation as regulation must strike a balance to achieve its goal. The direct effect of the striking of the balance is to curtail freedom of those regulated.

Mid 1958 Reports by Special Committee to Investigate Crude Oil Imports. By June, 1958, petroleum products importations in Districts I-IV were giving the Special Committee some concern. They had found that while crude importation was being kept within tolerable limits, the voluntary import program was being threatened by the importation of products. As a consequence, it was recommended that the Administrator commence a voluntary system to govern the importation of unfinished gasoline and other unfinished oil.<sup>118</sup> At that time it was concluded that residual fuel oil and miscellaneous product imports did not constitute a threat to the voluntary program, but the Director of the Office of Defense Mobilization and the Administrator were

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118. Report of the Special Committee to Investigate Crude Oil Imports, June 4, 1958. These recommendations were approved by White House Memorandum for the Secretary of the Interior on June 4, 1958.





asked to keep the situation with respect to petroleum products  
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under constant review.

With respect to District V, the June 30 report of the Special Committee found that the imports into this District had been less than the limit set. It therefore recommended that the 221,100 b/d ceiling remain and that the allocation for new importers and increases granted be within that overall figure. These recommendations were approved by the President  
120  
on 1 July 1958.

#### VOLUNTARY TO MANDATORY--IN TRANSIT

An objective appraisal of a program wherein the importers "voluntarily" tightened their import belts in order to bring about a healthy result to the economy and in furtherance of national security must include the adjective "successful". It was a success to get the program operating at all. The 97% effectiveness figure could not, of course, have been attained without excellent cooperation of the industry.

With the aid of hindsight, it can now be seen that as the program's success was a-growing, pressures were a-building which would lead to a logical and short step to further control as 1959 approached.

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119. Id. at 3.

120. White House Memorandum for the Secretary of the Interior of July 1, 1958.



Districts I-IV importers were multiplying and claiming a share of the total "allowable" b/d imports to that area. This meant that the major importers were having to reduce their quotas to make room.<sup>121</sup> How long the majors would be willing to absorb the resolution of inequities of small importers, at the formers' expense,<sup>122</sup> was a delicate question. Add to this circumstance the combination of many others and the seams of the voluntary program would be expected to receive strain and stress, if not to burst. Items: (1) Eastern was unhappy (to the point of litigation) with even the voluntary program, (2) The Mid-Year 1958 Oil and Gas Journal report showed:

(a) Refinery runs had to be cut in order to reduce product surplus--runs barely exceeded 1955s.<sup>123</sup>

(b) Production drop for first half (1958) was over 1 million b/d lower than comparable period for

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121. Oil & Gas J., June 23, 1958, p. 80.

122. Ibid. The words of De Chazeau and Kahn, Integration and Competition in the Petroleum Industry 248 (1959), become prophetic here: "Since this method of control can only become increasingly burdensome and arbitrary as the number of firms in possession or potential possession of foreign oil grows, quotas must be regarded as no better than a stop-gap measure."

123. Oil & Gas J., July 28, 1958, p. 135.



124  
previous year.

(c) Free foreign production exceeded U.S. output by  
125  
more than 2 million b/d.

(d) Imports of products other than residual fuel  
126  
gained 119% over the previous year.

(e) About 50 newcomers (importers) were looking for  
127  
quotas.

(3) With oil just beginning to show a climb out of the doldrums  
128  
indicated in "(2)" above, pressure for protection of domestic  
industry and prices was a predictable sequel.

As the year 1958 went on, requests for import quotas kept  
129  
coming in. The total amount of requested daily boosts in  
imports (Districts I-IV) went to approximately 1 million b/d.  
This is a large increase considering that the daily quota for  
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those Districts was, at that time, 713, 100 b/d. Coal men  
and independents were concerned about the rise in imports of  
131  
refined products and wanted curbs. August and September imports

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124. Id. at 138.

125. Op. cit. supra note 121, at 140.

126. Op. cit. supra note 121, at 142.

127. Op. cit. supra note 121, at 105.

128. Op. cit. supra note 121, at 100.

129. Import Quota Bids Mushroom, Oil & Gas J., August 11, 1958,  
p. 78.

130. Ibid.

131. Oil & Gas J., August 18, 1958, p. 105.



of crude and unfinished oils were above quota; Eastern States, having lost its court battle, was importing almost 4 times its quota; and a new plan, setting quotas on the basis of historical imports combined with refinery runs was being considered. <sup>132</sup> As 1958 drew to a close, a coal state Congressman, James E. Van Zandt of Pennsylvania announced plans to have Congress set quotas, declared that Congress never should have thrust the job of regulating imports upon the Executive, and was reported as favoring a cutback in residual imports in order to bring "new <sup>133</sup> hope" to coal miners.

That a revamping of the voluntary import program was in all likelihood to come was verified by an interim report of the Special Committee to Investigate Oil Imports, on 22 December <sup>134</sup> 1958. The Committee reported that it was engaging in an intensive review of the program and was going to present certain recommendations for change. Pending submission of those recommendations, the Committee desired that importers be advised that

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132. Oil & Gas J., November 3, 1958, p. 48.

133. Oil & Gas J., December 29, 1958, p. 73.

134. Approved by White House Memorandum for the Secretary of the Interior on December 22, 1958.





no changes would be made through February 28, 1959 in crude oil allocations, and that they also be requested to limit their importation of unfinished gasoline and other unfinished oils to the present allocations.

#### MANDATORY PHASE OF REGULATION

##### Machinery of Implementing Mandatory Phase.

In accordance with the Trade Agreements Extension Act of 1958,<sup>135</sup> the actions of the Special Committee, the Director of the Office of Civil and Defense Mobilization, the Secretary of State, the Deputy Secretary of Defense, and the President combined to implement this new phase of regulation. It should be recalled that the Act itself does not require mandatory controls, but that such controls could be imposed by the will of the President.<sup>136</sup>

##### Actions Taken.

At the instance of the Special Committee, the Secretary of State and the Deputy Secretary of Defense requested that the Director of the Office of Civil and Defense Mobilization, pursuant to the Trade Agreements Extension Act, make an appropriate investigation to determine the effects on the national security of imports of crude oil and its derivatives and products.<sup>137</sup>

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135. See text at page 25.

136. 72 Stat. 673 (1958), 19 U.S.C.A. 1352 a(b).

137. Report of Special Committee to Investigate Crude Oil Imports, March 6, 1959.



This investigation was undertaken by the Director on  
138  
28 January 1959. The Director reviewed the program and  
concluded that notwithstanding the effectiveness of the voluntary  
limitation plan, the quantities and circumstances of oil imports  
had not been stabilized. With particular mention of crude oil  
derivatives and products, it was cautiously tendered that there  
had been a circumvention of the limitation program. It was opined  
that imports had been a major contributing factor to the decline in  
drilling operations. The voluntary program was given credit for  
curtailing what would have been importation in drastic quantities.  
World oversupply was noted with a statement that without control,  
there would be substantial economic incentives to increase  
imports. In a supplemental memorandum, the Director noted that  
for the period 1954 to 1958 the domestic crude oil reserves were  
139  
increasing only 2.8% while demand for petroleum products  
increased 15.5%. This indicated to him that an incentive for  
exploration was needed. The determination was reached that  
crude oil and the principal crude oil derivatives and products  
were being imported in such quantities and under such circum-  
stances as to threaten to impair the national security.

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138. Director of Civil and Defense Mobilization, Memorandum  
for the President, February 27, 1959.

139. Director of Civil and Defense Mobilization Supplemental  
Memorandum for the President, March 4, 1959.



With the Director's recommendations in hand, the Special Committee recommended on March 6, 1959 that the Voluntary Oil Import Program be replaced by a mandatory program which would (1) limit imports and (2) distribute allocations among companies in a "fair and equitable manner."<sup>140</sup> Specific reasons for the need of a mandatory program were:

- (1) excessive imports by companies who had not complied with the Voluntary Program
- (2) a threat to the success of the Voluntary Program because of increased importation of unfinished oils and products.
- (3) the likelihood of increased non-compliance among companies now having allocations when they were asked to cut back imports voluntarily in order to provide allocations for newcomers to the program.
- (4) the impossibility of working out a desirable and legally permissible revision of the Voluntary Program acceptable to the Committee.

Recommended Control. The Committee then recommended<sup>141</sup> specifics for the mandatory program. It listed the derivatives which should be controlled as well as crude.

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140. Report of Special Committee to Investigate Crude Oil Imports, March 6, 1959.

141. Ibid.





Districts I-IV imports were to be related to demand and the limitation was to be about 9% of total demand in such Districts. Within that maximum limit, imports of finished products were not to exceed the 1957 level. In District V the imports were to be sufficient to make up the difference between domestic production and demand, again with derivatives and residual oil to be used as fuel to be topped at the 1957 level. In general, these amounts were to be subject to change by the Secretary of the Interior in order to meet minimum requirements of refiners and to meet the over-all objectives of the program as they pertained to the imports of residual fuel oil to be used as fuel in Districts I-IV.

In addition, Puerto Rican imports were to be watched. The Secretary of the Interior was to restrict allocations to those having refinery capacity in the U.S. Exchanges of foreign for domestic crude and products were to be made only when advance authorization was had for the same from the Secretary. Original allocations were to be made to those companies who imported in 1957 and in the amounts imported by them during such period. Controls were to become effective, at the latest, on 1 April 1959 and the Secretary of the Interior was to review allocations every 6 months. It was also recommended that the Director and the Secretaries of State, Defense, Treasury, Interior, Commerce,



and Labor keep a close surveillance of imports which might indicate the need for further Presidential action. An appeal Board was recommended which was to be comprised of a representative from the Departments of the Interior, Defense, and Commerce, which said Board could alleviate hardship or error or other special circumstances, but within the limits of the maximum level of imports.

142

Executive Proclamation 3279 of 10 March 1959.

This proclamation of 10 March 1959 gave Presidential blessing to a mandatory program. The recommendations of the Special Committee, with more detail and definition, were adopted. The Secretary of the Interior was authorized to issue regulations to implement the program. Such regulations were to provide for the revocation or suspension by the Secretary of any allocation or license on grounds relating to the national security, or the violation of the terms of the proclamation, or any regulation or license issued pursuant to the proclamation.

143

The Executive Order providing for the Buy American phase of the voluntary program, no longer needed, was revoked, and the Special Committee was discharged.

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142. 24 Fed. Reg. 1781 (1959).

143. 23 Fed. Reg. 2067 (1958).



As an example of how an inarticulate predicate of a recommendation can facily become a firm criterion of regulation, recall that the OCDM and the Cabinet Secretaries were, by the Special Committee's recommendation, to keep a constant surveillance of imports, etc.. When that recommendation was presented for the President's pen and signed, it had grown to include:

"In the event prices of crude oil or its products of derivatives should be increased after the effective date....such surveillance shall include a determination of whether such increase or increases are necessary to accomplish the national security objectives...."<sup>144</sup>

(Emphasis added)

The President's statement in issuing the Proclamation noted his regret in having to make the system mandatory because of the unwillingness of a few to join in the voluntary program. Actually it was a rather painless step to take as it would serve to equalize responsibility among all and would benefit those who had been previously complying by a more equitable division of quotas.

The Shape of Administration.

145

The Oil Import Regulation implementing the Presidential

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144. Presidential Proclamation 3279 of 10 March 1959, §6(a), 24 Fed. Reg. 1781. It is hazarded that this was included by work of the staff. No other explanation for its inclusion has been found.

145. 24 Fed. Reg. 1907 (1959).





Proclamation was issued soon after (March 13, 1959) by the Secretary of the Interior. Its pattern of allocation was as recommended and discussed above. Allocations were made according to past refinery inputs and past imports, in an effort to more equitably distribute the allocations.<sup>146</sup> Sections 19 and 20 contain the teeth of control as they relate to criminal penalties and revocation or suspensions of licenses.

Clarifications were soon made with respect to unfinished oil importation<sup>147</sup> and proper method of exchanges (oil for oil only--not oil for money or for credit).<sup>148</sup> Also, the Oil Import Appeals Board was authorized to make its own procedural rules;<sup>149</sup> Proclamation number 3279 was modified;<sup>150</sup> and notice of miscellaneous amendments was given on 28 May 1959.<sup>151</sup> From this emanated the June 6, 1959 "Oil Import Regulation 1  
[Revision 1].<sup>152</sup>

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146. *Id.* at § §10 and 11.

147. 24 Fed. Reg. 2361 (March 19, 1959).

148. 24 Fed. Reg. 2361 (March 24, 1959).

149. 24 Fed. Reg. 3527 (April 3, 1959).

150. 24 Fed. Reg. 3527 (May 1, 1959). By this, products entering the U.S. by pipelines or overland means were exempted from restriction. This was primarily for the mutual benefit of District V and Canada. The President announced on April 30 that this was in the interests of joint defense of the hemisphere and that Venezuela and other Western Hemisphere countries had not been forgotten (April 30, 1959 press release by Hagerty, Press Secretary to the President.)

151. 24 Fed. Reg. 4379 (1959).

152. 24 Fed. Reg. 4654 (1959). This was amended on August 14, 1959 by revising the definition of refinery inputs to conform to paragraph (c) of §1 of Presidential Proclamation 3290, (24 Fed. Reg. 3527 (1959)). See Appendix II.





The launching of the mandatory phase of the program was  
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perhaps made more propitious by a rising domestic demand.  
The first half of 1959 demand was 6.4% over the first half of  
1958 demand. It was thus possible to launch the mandatory  
program with a 30,000 b/d increase, making the July 1 to  
154  
December 31, 1959 allowable at 1,450,362 b/d. Mandatory controls  
were no panaceas for old plagues, however. By the end of July 81  
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petitions for revisions in import quotas had been filed.  
This amounted to about 1/3 of the importers. For those who were  
not in accord with the philosophy of quotas, as compared to some  
other method of control, a mandatory program vice a voluntary one,  
156  
offered no succor.

Eastern States Petroleum and Chemical Corporation was still  
not satisfied with its particular quota and again sought the  
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assistance of a federal court. Two cases, styled Texas-  
American Asphalt Corp. v. Walker and Eastern States Petroleum  
& Chemical Corporation v. Walker, were decided by the U.S.  
District Court for the Southern District of Texas on 18 September  
158  
1959. Both plaintiffs sought declaratory judgments and

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153. Mid-Year Report, Oil & Gas J., June 27, 1958, p. 132.

154. Oil & Gas J., June 15, 1959, p. 61.

155. Op. cit. supra note 151, at 120.

156. De Chazeau & Kahn, Integration and Competition in the Petroleum Industry 253 (1959): "Imposition of compulsory quota controls in March 1959 represented a more forthright course of action; but it makes no more economic sense than the policy it supplanted."

157. Oil & Gas J., June 15, 1959, p. 63.

158. 177 F. Supp. 315 (S.D. Texas 1959) and 177 F. Supp. 328 (S.D. Texas 1959).



injunctions against the Collector of Customs to restrain him from enforcing the mandatory program. Texas- American, a newcomer to refining, had no history of refinery input. Texas-American, although not unaware of the forthcoming restrictions in 1959, entered into a contract to buy a special type of Venezuelan crude for its asphalt plant, called Bachaquero crude. The regulation, when it came out, would only permit the granting of allocations to those with a history of refinery inputs. Claiming hardship, Texas-American asked for a quota in order that it might fulfill its contract to purchase the Bachaquero oil. The quota was refused on the ground that there was no history of refinery inputs. While the action was brought to test the validity of the administrative ruling denying a license and an allocation, the holding of the case was that the Administrator and the Appeals Board were indispensable parties. Although in the nature of dicta, the court discussed the merits of the case and declared:

- (1) That the President had not acted arbitrarily or capriciously in causing the regulations to be made;
- (2) That the Administrator correctly construed the regulations; and
- (3) That no one had any vested right to carry on foreign commerce and that governmental regulation of foreign commerce, if based upon congressional policy, was not invalid, even if it resulted in the regrettable consequence of forcing a company or an industry out of business.



Another issue raised by Texas-American was based upon Section 12 of the then current regulations, which provided the authority to allocate imports of crude by a refiner who was unable to obtain quantities of domestic crude oil by ordinary and continuous means, such as barges, pipelines or tankers, "sufficient to meet his minimum requirements". To this sufficiency, Texas-American would have read into the regulations the words "efficiently and economically". The court pointed out, however, that Texas-American was able to obtain domestic crude continuously. The circumstance that the type of crude locally and continuously obtainable was not the best and most economical type for the Company's operation did not require the Administrator the grant an allocation. This again is an example of reasonable regulation which by its very nature creates individual hardship as the equities are averaged.

Eastern States Petroleum, on the other hand, had a history of refinery inputs, but desired a larger allocation than had been granted. As in the Texas-American case, the holding turned on the indispensability of parties. Eastern declared that it was not challenging the validity of Proclamation 3279 or of the oil import regulation, but was just seeking an adjustment in its allocation, on the grounds of hardship. The essence of the hardships were that the Company had failed to include all of





its planned imports in its submitted estimate and that it was exporting some of its imports, for which it was not receiving credits against imports. The court pointed out that there was no regulation providing for export credits, thus implying support of the refusal of the Oil Import Appeals Board to grant any relief on that score. Further, the court declined to invade the administrative function of finding whether there was any hardship that would merit special consideration.

In both cases the District Court noted that it was passing judgment on the merits because of the liklihood of appeal. Due to the firmly established congressional power of regulation of foreign commerce, as well as its power with regard to national security, a wholesale attack upon the program of mandatory restrictions is not likely to meet with success. While further litigation is to be expected, it is most likely to be confined to that narrow field where, under present administrative law, there is an occasional chance of success, i.e., the arbitrariness or capriciousness of the regulations or the administration thereof.

It therefore appears that a lawful, reasonable and perhaps manageable system of equitably allocating imports has evolved from the 30 years of national concern over the problem. It is the opinion of government experts that the voluntary program



averted severe economic difficulties in the oil industry. Whether the industry would whole-heartedly join in such a conclusion is problematical (for some are importers and some are not) but the continued support of the oil states for import restrictions indicates, from a practical standpoint, that the majority of industry members (in a political sense) is for oil import restrictions. And they want more. On the other hand, the Oil Compact Commission is keeping a close watch on the coal-industry backed "national fuels policy", undoubtedly to see that the coal industry does not obtain any synthetic support in its competition with petroleum, via imports or any other method.

Perhaps one of the most difficult administrative problems of the program will be to keep its function within the intended scope of its creation, i.e., for the purpose of national (and now hemispheric) security. Pressures for changing the mold of the program will inevitably be generated from "grass roots"

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159. The Dallas Morning News, 5 December 1959, §1, p. 8, col. 4. Here Senator Yarborough (D-Texas) was reported as describing the mandatory oil import program as "a slender reed....We need a stronger basis for the control of oil imports than this."
160. The New York Times, 4 December 1959, p. 45, Col. 4: "Compact Urges Close Watch on Fuels Policy Movement". See also, "Coal Aims to Undermine Oil's Markets", Oil & Gas J., December 14, 1959, p. 41.



economics as it affects politics of the same ilk. Unfortunately, the voices of the guardians of the bigger, longer term picture, while agreed with in principle, are drowned in the clamor of the daily pursuit of the Yankee dollar.<sup>161</sup> Admiral Rickover, one of these voices, warned that our "belief that our high standard of living guarantees political and military supremacy" is potentially "our most dangerous illusion."<sup>162</sup> We can certainly ill-afford mistakes in many or large "pragmatic adjustments" when it comes to our national security for they could mean the historic difference between survival and requiem.

Over-concern about prices is, in my opinion a large threatened derailment of the true purposes of the regulation. As mentioned heretofore,<sup>163</sup> the matter of petroleum prices found its way into the President's March 10th proclamation. This was immediately picked up by a foreign trade journal, as "An entirely novel aspect of the new imports controls which could have far reaching results...."<sup>164</sup> No amount of study of the raison d'etre of import controls can justify the use of price controls in order to curtail what someone considers to be excessive profits or, on

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161. The Dallas Morning News, December 10, 1959, §1, p. 22, col. 1: "Rickover Says High Living Standard May be Liability-- Admiral Deplores Decline in U.S. Natural Resources."

162. Id. at p. 1, col. 2.

163. Op. cit. supra note 144.

164. Petroleum Press Service, April 1959, Vol. XXVI, No. 4, p. 126-28.





the other hand, what someone envisions as an "operation bootstraps" to protect an ailing and unable-to-compete-industry. It would be truly ludicrous if the program were used for the later purpose--for if the industry were so ailing, then it would be high time that we turn our efforts, national security wise, into the stimulation of imports!

It may well be that rising demand will be the end of government regulation in this field. The import quotas for the first half of 1960<sup>165</sup> continue the trend of rising imports based on percentage of total demand. What is happening in District V may well be the prelude of what will happen in the other Districts. There (District V) the demand keeps increasing, while domestic production is not satisfying the need. Even with the exemption of Canadian overland oil, the difference jumped from a 265,500 b/d deficit between supply and demand during the last half of 1959, to 279,000 b/d (estimated) during the first half of 1960.<sup>166</sup>

Current periodicals and discussion groups are showing much concern over the enormity of the geometric "population explosion". Partial realizations of these predictions in the near future will have an impact on the reserves of all our natural resources.

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165. The New York Times, 14 December 1959, p. 51, col. 3.

166. Ibid.





While one periodical sees Europe and the U.S.A. safely through 1975, with petroleum and additional imports satisfying most of the demand,<sup>167</sup> there will undoubtedly be an increased flexibility of choice and use of products for creation of energy as dictated by economics.<sup>168</sup>

This all portends that government regulation may eventually be, if at all, in the field of rationing imports, rather than restricting them!

#### SUMMARY OBSERVATIONS

By the foregoing, an attempt has been made objectively to synthesize the legal economic and political factors which have contributed to the evolution of the segment of governmental regulation of the oil and gas industry under study.

It is clear that if our policy and law makers saw the problem in such a fashion that controls ought to be different, then that the law is would be quickly changed to conform. Thus, the role of the jurisconsult in this field is necessarily

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167. Petroleum Press Service, Feb. 1960, Vol. XXVII, No. 2, p. 41-43.

168. A present example of this is the shift from oil to gas and coal. See The Dallas Morning News, Feb. 28, 1960, §4, p. 3, col. 1. At col. 4-7 the headline is, U.S. Study Sees Long-Range Oil Need, with a report that a rise in demand in the U.S. from 1959's 9,700,000 b/d to 17,100,000 b/d is predicted by 1976. Population by that time is expected to reach 230,000,000.



limited. Once he had developed the evolution and statutory basis of oil import regulation, the job of framing the case for change rests with those who would have the change, based upon their facts and reasons whether they be political, economic or military.

In this regard, the foregoing study reveals a plethora of interests to be weighed in the regulation of oil imports and a modicum of illumination of the correct paths to follow. Stated otherwise, it demonstrates that we probably do not know the answers to basic questions sufficiently well to forge conclusions as to what policy changes, if any, should be made. Summarized further and more cryptically, "Wanted: constructive criticism, conclusions and a denouement."

It would be desirable as a contribution to the welfare of this country if one could conduct a legal examination of the conflicting parameters in the import equation and offer a neatly packaged solution which, after having balanced the interests of the oil industry, the consumer and national defense, could tender the best results for all. The writer does not pretend such omniscience.

In a democracy such as ours, restrictions on the complete freedom of one to deal with his share of our wealth of natural resources have come to us through the process of reluctant



evolution rather than experimental fiat. The individual voices of the vox populi sometimes cry out in indignant frustration with such incantations as, "There ought to be a law!" or "Why don't they do something about it?" As a chorus, however, the vox populi is more temperate and is not panacean in nature. The role of the Federal government in the formulation of our oil import policy has been described as pusillanimous, and has been criticized for the lack of coordination and consistency. It is difficult to see how it could be otherwise in its efforts to satisfy all. It has reached no heights or penetrated to no depths other than has been demanded of it. It is the best product that our political processes have been able to manufacture with the raw material furnished by our expert economists and our defense establishment. State conservation policies do, of course, play a part in the rate of production of petroleum and its prices.<sup>169</sup> Responsibility for the regulation of oil imports, however belongs exclusively to the Federal government.

To the discerning, it should be abundantly clear from this study that our policy difficulties have stemmed largely from the dichotomous desires of keeping our oil and using it, too. The facts here are eloquent without any additional articulation. An umbrella of policy attempting to satisfy both of these desires must, by its nature, be ad hoc, pragmatic, and as tractable as crisis demands.

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169. See text at p. 11





Paradoxical as it may seem, the cautious policy with respect to these bifurcated goals is proceeding successfully without any notable detriment to the country, to the industry, or to the national defense. Complacency, however, is not a logical predicate. This is because the present success will continue only so long as the dimension of time and abundance of resources do not demand an immediate accounting.<sup>170</sup> But there's the rub. When an immediate accounting looms necessary, it may be too late. A boy never knows how many green apples it takes to make him sick until he has completed his experiment. Happily, he is likely to recover from his reckless prodigality and live to be the wiser. When time and abundance of domestic resources reveals that our consumption is rapidly overtaking supply of petroleum, the prognosis for the continued welfare of the Nation is not as good as the little boy's. Legislation, belt tightening or late arriving wisdom will not replace the irreplaceable. The illusion about which Admiral Rickover spoke, i.e., that our high standard of living guarantees political and military supremacy, will have been dissipated.<sup>171</sup>

This brings the wedding of national defense to a healthy industry under the spotlight of examination. At this point,

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<sup>170</sup> See text at p. 20 and footnote 57.

<sup>171</sup> See text at p. 63.



politics and economics appear on the scene. "What's good for X industry is good for the country" has been recently a popular (and maligned) slogan summarizing our abiding faith in our capitalistic system. As noted in the text, this philosophy has been criticized by Senator Douglas as containing an "implicit syllogism" which concludes that the health of every industry is complementary of our total economic welfare and national defense. While one may generate a chuckle out of the niche that pregnant mare's urine occupies in his examples of protected products, he must be sobered when considering a replaceable product vis a vis a wasting and irreplaceable one. Many a pauper has arrived at his status by contributing too vigorously to the national economy by freely circulating his money. This does not change his status as a pauper. Likewise it must be conceded that a healthy petroleum industry contributes to the general welfare of the country. But the unanswered and unknown is how soon such prosperity, dependent upon consumption will, by the momentum of its enterprise, hurl itself out of existence. When this occurs, the ruin will not be confined to the petroleum industry. It will cripple the entire country unless by that time other sources of energy such as atomic energy have replaced hydrocarbons.



This brings us to the moment of truth, the point where the wealth of the petroleum interests for the present is in conflict with the welfare of the country in the future. Unless one is thoroughly dedicated to the present and the dollar, there can be no quibbling about whether the nation or the petroleum industry should suffer. The industry has no vested rights of supremacy to the detriment of all. Quarrels about whether it is wise to maintain reserves in the ground for the purpose of national defense must be stripped bare and the intent of the proponents revealed. Greed and avarice did not cease with Teapot Dome.

Should we, therefore, rest content on the conclusions of the Special Committee to Investigate Oil Imports which, inter alia, rejected as unsound the outright encouragement of increased imports in order to conserve domestic reserves?<sup>172</sup> I say we should not. A large part of the committee's rationale was in my opinion, dedicated to solicitude toward the industry.<sup>173</sup> The interests of the nation and the consumers were subordinated and rationalized.

Continued re-examination of our policy is recommended in the hope that it may be molded to coincide with cogency, con-

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172. See text at p. 34-35.

173. Perhaps the industry is in continued need of solitude as of the first half of 1960. See "What the Crude Market is up against", Oil & Gas J., May 23, 1960, p. 61.



servation and conscience. If it be decided that a hedge on the safe side will best serve everyone, then everyone can share in the cost of conservation rather than take the gamble on having the consumer and the nation bear the cost of protection.<sup>174</sup>

We should continue to examine courses of action that have been rejected as being too costly, as presenting too many physical problems and as "contrary to the principles of free enterprise which characterize American industry"<sup>175</sup>. That is, we should continue to seriously consider such courses of action as: (1) importing foreign crude into the U.S. and storing it in completed fields or elsewhere and, (2) enlarging government participation in exploring for oil reserves which would be shut in when discovered. Furthermore, if the petroleum industry is found to be ailing as a result of an overabundance of free imports, perhaps a better way to treat the industry would be: (1) let it suffer until better days (which are sure to arrive) when imports will be welcomed by all or (2) if the industry must be aided through a period when imports are hurting it, we should consider a type of subsidy which involves financial support only--that is a financial support that is not predicated upon an accelerated withdrawal of our petroleum reserves.

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174. See text at p. 13-14.

175. See text at p. 34.





Thus, the problem clearly points up, from the jurisprudential side of legislative policy, that the most static part of the problem is the varied opinion. To a large extent these differences of opinion are likely to continue until opinions are displaced by facts. To aid in the formulation of legislative policy the military and the economists have the task of developing these facts. In the mean time, it is probably the wiser course of the law to remain static.

National security pervades much of our current foreign and domestic policy today. As such, national defense and security is a handy whipping boy, either pro or con, on a variety of subjects. The legal history of the present import regulations shows that national defense considerations were said to have been a prime factor in the present system of regulation. Upon such a thesis, we are now proceeding. Is it wrong?

Will a future war last long enough for us to be concerned about vast reserves of oil? If not, will our oil reserves have dwindled to such a point that we could not sustain even a short war? How frequently and of what duration may we expect "brush fire" wars? Are we better gamblers than Nazi Germany was, recalling that a Nazi Germany decided upon a weighted judgment to start a war (a decision the U.S. would probably never make) and found out that when petroleum supplies failed,



the end came? Will the atom and solar energy sources antiquate the use of petroleum as an energy source of importance before petroleum reserves are depleted?

And further, what about the over-all problem of foreign oil development by American companies? Should this endeavor be encouraged or discouraged? How are the values of statemanship and national interest going to be fitted into the mosaic of economic reality?

If government encourages foreign oil development and then regulates imports in such a fashion as to deny swift recovery of the investment, the investment is placed in jeopardy and government policy is ripe for criticism. If, on the other hand, foreign oil development is officially discouraged, a void for Russian exploitation will have been created and a greater burden of drain will have been placed upon our domestic reserves.

Breaking the unknowns down further into practical economics, should we favor the few large integrated companies who gain more from imports than the independents, or the independents who seem to wield more political power? How should quotas be affected by our foreign policy, if at all? And militarily, do we have any real hope of evading foreign submarines with our tankers, should the need arise? If so, how bright are our chances in keeping the foreign land masses containing petroleum out of



unfriendly hands?

A look at the map and a cursory knowledge of Russia's ambitions and capabilities of mustering a huge land force does not give one cause for optimism. But, the independents would not conclude therefrom that we should accelerate importation of Middle Eastern Oil.

And finally, what about the oil import regulation itself.  
Is the quota system economically sound?<sup>176</sup> Certain changes have  
been made since its original writing<sup>177</sup> and only time will tell whether it will accomplish its intended purpose. In the meantime, the lawyers and lawmakers should maintain an open and sympathetic ear for any additional factual data that can be produced by the industry, the politico-economists, and the military.

The studies cited in the foreward have made economic and political appraisals touching on the answers to some of the foregoing rhetorical questions. These have not resulted in sufficient unanimity of conclusion to dictate that our policy should be different from what it is. When, within the industry itself, the majors urge that freedom of imports will promote national security and the independents urge that more stringent

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176. See text at p. 62.

177. See text at p. 57.





restrictions of imports will promote national security, one must conclude that they cannot both be right and that "national security" is given a meaning which is promotional of self interests. This is a large part of the "problem" in the regulation of oil imports.

The current legislation is flexible enough to meet whatever is demanded of it in the way of increased or decreased imports. Administrative changes can be made without any additional legislation. The Office of Civil and Defense Mobilization is charged with constant surveillance of the program, and it is the forum through which any administrative recommendations for change under current legislation could and should be made.







Oil Import Regulation 1 Revision 17

Sec.

1. Purpose.
2. Oil Import Administration.
3. Allocation periods.
4. Eligibility for allocations.
5. Applications for the allocation period Jan. 1, 1950, through June 30, 1960, and successive periods.
6. Licenses.
7. Small quantities.
8. /Reserveg/
9. Determination of quantities available for allocation--Districts I-IV, District V.
10. Allocations of crude oil and unfinished oils--Districts I-IV.
11. Allocations of crude oil and unfinished oils--District V.
12. /Reserved/
13. Allocations of finished products--Districts I-IV, District V.
14. Determination of maximum level of imports--Puerto Rico.
15. Allocation of crude oil and unfinished oils--Puerto Rico.
16. Allocations of finished products--Puerto Rico.
17. Use of imported crude oil and unfinished oils.
18. Reports.
19. False statements.
20. Revocation or suspension of allocations or licenses.
21. Appeals.
22. Definitions.

(Authority: Secs. 1 to 22 issued under Proc. 3279, as amended 24 F.R. 1781, 3527; sec. 2, 68 Stat. 360, as amended, 72 Stat. 678; 19 U. S. C. 1352a.)

Sec. 1 Purpose.

These regulations implement Presidential Proclamation 3279, "Adjusting Imports of Petroleum and Petroleum Products into the United States," dated March 10, 1959 (24 F. R. 1781), as amended, by providing for the discharge of the responsibilities imposed upon the Secretary of the Interior.

Sec. 2 Oil Import Administration.

There is established in the Department of the Interior an Oil Import Administration under the direction of an Administrator





designated by the Secretary of the Interior. The Administrator is hereby empowered to exercise, pursuant to this regulation, all of the authority conferred upon the Secretary by Proclamation 3279, as amended, and the Administrator may redelegate such authority.

### Sec. 3 Allocation periods.

Allocations of imports of crude oil and unfinished oils will initially be made for the period March 11, 1959 through June 30, 1959. Allocations of imports of finished products will initially be made for the period April 1, 1959 through June 30, 1959. Thereafter, allocations will be made for periods of six months--that is, July 1 through December 31; January 1 through June 30.

### Sec. 4 Eligibility for allocations.

(a) To be eligible for an allocation of imports of crude and unfinished oils in Districts I-IV or in District V, a person must (1) have refinery capacity in the respective districts and (2) in respect of an allocation for the allocation period March 11, 1959 through June 30, 1959 have had refinery inputs in the respective districts for the calendar year 1958 and (3) in respect of the allocation period July 1, 1959 through December 31, 1959, and each successive allocation period thereafter have had refinery inputs in the respective districts for the year ending three months prior to the beginning of the allocation period for which the allocation is requested.

(b) To be eligible for an allocation of imports of crude oil and unfinished oils for Puerto Rico, a person must have refinery capacity in Puerto Rico and must have had refinery inputs in Puerto Rico during the months of July, August, and September of the year 1958.

(c)(1) To be eligible for an allocation of imports of finished products, other than residual fuel oil to be used as fuel, in Districts I-IV or District V, a person must have imported such products into the respective districts during the calendar year 1957.

(2) To be eligible for an allocation of imports of residual fuel oil to be used as fuel into the respective districts during the calendar year 1957.

(3) To be eligible for an allocation of imports of finished products, other than residual fuel oil used as fuel,





in Puerto Rico, a person must have imported such products into Puerto Rico during the last half of the calendar year 1958.

(4) To be eligible for an allocation of imports of residual fuel oil to be used as fuel in Puerto Rico, a person must have imported residual fuel oil used as fuel into Puerto Rico during the last half of the calendar year 1958.

(d) A person is not eligible individually for an allocation of crude oil and unfinished oils or finished products if the person is a subsidiary or affiliate owned or controlled, by reason of stock ownership or otherwise, by any other individual, corporation, firm or other business organization or legal entity. The controlling person and the subsidiary or affiliate owned or controlled will be regarded as one. Allocations will be made to the controlling person on behalf of itself and its subsidiary or affiliate but, upon request, licenses will be issued to the subsidiary or affiliate.

#### Sec. 5 Applications for the allocation period Jan. 1, 1960 through June 30, 1960, and successive periods.

With respect to the allocation period Jan. 1, 1960 through June 30, 1960, and each successive allocation period thereafter, an application for allocations of imports of crude oil and unfinished oils or finished products must be filed with the Administrator, in such form as he may prescribe, not later than sixty calendar days prior to the beginning of the allocation period for which the allocation is required, except that if the sixtieth day is a Saturday, Sunday, or holiday, the application may be filed on the next succeeding business day.

#### Sec. 6 Licenses.

(a) When an allocation has been made to a person under this regulation, the Administrator shall, upon application in such form as he may prescribe, issue a license or licenses based on the allocation, specifying the amount of crude oil and unfinished oils or finished products which may be imported, the period of time such license shall be in effect, and the districts (Districts I-IV, District V, or Puerto Rico) into which the importation may be made. The Administrator may amend such licenses.

(b) No license issued pursuant to this section may be sold, assigned, or otherwise transferred.



Sec. 7 Small quantities.

(a) Collectors of Customs are authorized to permit without a license baggage entries, and entries for consumption of small quantities of crude oil, unfinished oils, or finished products which are certified as samples for testing or analysis and which do not exceed 110 gallons per entry.

(b) Persons desiring to import small quantities not covered by paragraph (a) of this section should file with the Administrator a request for an authorization for entry without a license for each shipment describing the oil and quantity to be imported and listing the port of entry.

Sec. 8 /Reserved/

Sec. 9 Determination of quantities available for allocation--  
Districts I-IV, District V.

(a) Prior to the beginning of each allocation period the Administrator shall determine in accordance with the limitations imposed by section 2 of Proclamation 3279, as amended, the quantities of imports of crude oil and unfinished oils which are available for allocation in Districts I-IV and in District V, respectively, and the quantities of imports of residual fuel oil to be used as fuel and of imports of finished products other than residual fuel oil to be used as fuel which are available for allocation in such districts.

(b) After each such determination the Administrator shall as provided by these regulations make allocations to eligible applicants for the appropriate allocation period.

Sec. 10 Allocations of crude oil and unfinished oils--Districts  
I-IV.

(a) The quantity of imports of crude oil and unfinished oils determined to be available for allocation in Districts I-IV for the allocation period July 1, 1959 through December 31, 1959, shall be allocated by the Administrator among eligible applicants as provided in paragraphs (b) and (c) of this section.

(b) Except as provided in paragraph (c) of this section, each eligible applicant shall receive an allocation based on refinery inputs for the year ending March 31, 1959 and computed



according to the following schedule:

<u>Average B/D Input</u>	<u>Percent of Input</u>
0-10,000	11.4%
10-20,000	10.4%
20-30,000	9.5%
30-60,000	8.5%
60-100,000	7.6%
100-150,000	6.6%
150-200,000	5.7%
200-300,000	4.7%
300,000 plus	3.8%

(c) If an eligible applicant has been importing crude oil pursuant to an allocation under the Voluntary Oil Import Program and if an allocation computed under paragraph (b) of this section would be less than 75.7 per cent of the applicant's last allocation of imports of crude oil under the Voluntary Oil Import Program, the applicant shall nevertheless receive an allocation under this section equal to 75.7 per cent of his last allocation of imports of crude oil under the Voluntary Oil Import Program.

(d) No allocation made pursuant to this section shall entitle a person to a license which will allow the importation of unfinished oils in excess of 10 per cent of the allocation.

(e) No allocation made pursuant to this section may be sold, assigned, or otherwise transferred.

#### Sec. 11 Allocations of crude oil and unfinished oils--District V.

(a) The quantity of imports of crude oil and unfinished oils determined to be available for allocation in District V for the allocation period July 1, 1959 through December 31, 1959 shall be allocated by the Administrator among eligible applicants as provided in paragraphs (b) and (c) of this section.

(b) Except as provided in paragraph (c) of this section, each eligible applicant shall receive an allocation based on refinery inputs for the year ending March 31, 1959, and computed according to the following schedule:





Average B/D Input

Percent of Input

0-10,000	37.5%
10-20,000	30.0%
20-30,000	22.5%
30-60,000	15.0%
60-100,000	12.0%
100-150,000	11.0%
150-200,000	10.0%
* 200,000 Plus	8.0%

(c) If an eligible applicant has been importing crude oil pursuant to an allocation under the Voluntary Oil Import Program and if an allocation computed under paragraph (b) of this section would be less than 80 per cent of the applicant's last allocation of imports of crude oil under the Voluntary Oil Import Program, the applicant shall nevertheless receive an allocation under this section equal to 80 per cent of his last allocation of imports of crude oil under the Voluntary Oil Import Program.

(d) Allocations made pursuant to this section shall not permit the importation of unfinished oils in excess of 10 per cent of the permissible imports of crude oil and unfinished oils. With respect to any allocation made pursuant to this section, the Administrator upon request shall issue a license permitting the importation of unfinished oils in an amount not in excess of 10% of the allocation. If the total quantity of unfinished oils applied for is less than 10% of the permissible imports of crude and unfinished oils, the Administrator may to that extent increase the percentage amount of unfinished oils specified in licenses of persons who request such increases. Each person making such a request shall receive an increase in the proportion that his allocation bears to the total of allocations made to all persons requesting increases.

(e) No allocation made pursuant to this section may be sold, assigned, or otherwise transferred.

Sec. 12 /Reserved/

Sec. 13 Allocations of finished products--Districts I-IV, District V.

(a) The quantity of imports of finished products determined to be available for allocation in Districts I-IV and in District V



for any particular allocation period shall be allocated by the Administrator to each eligible applicant in the proportion that the applicant's imports of finished products during the calendar year 1957 bore to the imports of such products during that year by all eligible applicants. Separate allocations shall be made for imports of residual fuel oil to be used as fuel and for imports of finished products other than residual fuel oil to be used as fuel.

(b) No allocation made pursuant to this section may be sold, assigned, or otherwise transferred.

#### Sec. 14 Determination of maximum level of imports--Puerto Rico.

(a) Pursuant to section 2 of the Proclamation 3279, it is determined (1) that the average barrels per day of imports of crude oil and unfinished oils into Puerto Rico during any particular allocation period shall not exceed the average barrels per day, as determined by the Administrator, during the months of July, August, and September of the year 1958 of imports of such commodities into Puerto Rico, and (2) that the average barrels per day, as determined by the Administrator, of imports of residual fuel oil to be used as fuel and of imports of finished products other than residual fuel oil to be used as fuel into Puerto Rico during any particular allocation period shall not exceed the average barrels per day of imports of such products, respectively, into Puerto Rico during the last half of the calendar year 1958.

(b) The Administrator shall from time to time review the determinations set forth in paragraph (a) of this section and shall recommend to the Secretary of the Interior that the level of imports be increased or decreased as may be required to meet increases or decreases in local demand in Puerto Rico or in demand for export to foreign areas.

#### Sec. 15 Allocation of crude oil and unfinished oils--Puerto Rico.

(a) For the allocation period July 1, 1959 through December 31, 1959, the Administrator shall allocate to each eligible applicant for an allocation for Puerto Rico quantities of imports of crude oil and unfinished oils equal to the applicant's average barrels daily of refinery input (adjusted by the Administrator for downtime) in Puerto Rico during the months of July, August and September of the year 1958.



(b) In the event that the maximum levels of imports of crude oil and unfinished oils are increased or decreased pursuant to paragraph (b) of section 14, the Administrator shall increase or decrease individual allocations in the proportion that each allocation bears to the total allocation of crude oil and unfinished oils.

(c) No allocation made pursuant to this section may be sold, assigned, or otherwise transferred.

#### Sec. 16 Allocations of finished products--Puerto Rico.

(a) For the allocation period July 1, 1959 through December 31, 1959, the Administrator shall allocate to each eligible applicant for an allocation for Puerto Rico a quantity of imports of finished products equal to the applicant's average barrels daily of imports of such products during the last 6 months of the calendar year 1958. Separate allocations shall be made for imports of residual fuel oil to be used as fuel and of imports of finished products other than residual fuel oil to be used as fuel.

(b) In the event that the maximum level of imports of residual fuel oil to be used as fuel or of finished products other than residual fuel oil to be used as fuel is increased or decreased pursuant to paragraph (b) of section 14, the Administrator shall increase or decrease individual allocations in the proportion that each allocation bears to the total allocations of residual fuel oil to be used as fuel or of finished products other than residual fuel oil to be used as fuel, respectively.

(c) No allocation made pursuant to this section may be sold, assigned, or otherwise transferred.

#### Sec. 17 Use of imported crude oil and unfinished oils.

(a) Each person who imports crude oil or unfinished oils under a license issued pursuant to an allocation made under sections 10, 11, or 15 of this regulation must process the oils so imported in his own refinery, except that foreign crude oil may be exchanged for either domestic crude oil or domestic unfinished oils and foreign unfinished oils may be exchanged for either domestic unfinished oils or domestic crude oil for processing in such refinery if:





- (1) the exchange is not otherwise unlawful;
- (2) the exchange is effected on a current basis-- that is, not more than ninety days elapse between the delivery of foreign and domestic oil under the exchange agreement; and
- (3) the proposed exchange agreement is reported to the Administrator before it is acted upon.

(b) All exchanges must be on an oil-for-oil basis and any exchange involving adjustments, settlements, or accounting on a monetary basis is not permissible and will not be approved by the Administrator.

#### Sec. 18 Reports.

(a) Each person who imports crude oil, unfinished oils, or finished products under a license issued under this regulation shall report to the Administrator the quantities in barrels corrected to 60° F of crude oil, unfinished oils, and finished products so imported. Each report shall state through which port of entry the importation was made and shall specify the kinds of unfinished oils and finished products imported. Each report should be filed with the Administrator within fifteen days of the end of a particular month.

(b) Each person who exchanges oil pursuant to section 17 of this regulation shall report to the Administrator identifying all parties to the exchange agreement, stating the types and quantities of foreign and domestic oil involved, and describing the basis on which the exchange rests. Such reports must show that not more than ninety days will elapse between the delivery of the foreign and domestic oil. Such reports will be available for public inspection. In addition, any changes occurring during an allocation period in the types of oils or the exchange ratio shall be reported. If an exchange agreement continues beyond the allocation period during which it was consummated, a new report should be filed at the beginning of each new allocation period.

#### Sec. 19 False statements.

Persons concealing material facts or making false statements in or in connection with any applications or reports filed with the Administrator or in connection with any license presented to or statements made to a Collector of Customs with respect





to imports of crude oil, unfinished oils, or finished products, are guilty of a crime and upon conviction may be punished by fine or imprisonment or both.

#### Sec. 20 Revocation or suspension of allocations or licenses.

The Administrator may, after a hearing, revoke or suspend any allocation or license issued under this regulation, on grounds relating to the national security, or the violation of the terms of Proclamation 3279, this regulation, or licenses issued pursuant thereto.

#### Sec. 21 Appeals.

(a) There is hereby established an Oil Import Appeals Board, comprised of one representative each from the Departments of Commerce, Defense, and Interior, designated respectively, by the Secretaries of such Departments. The Board shall elect a Chairman from its own membership.

(b) The Appeals Board shall hear and consider petitions and appeals by persons affected by this regulation and may, on grounds of hardship, error, or other relevant special consideration, but within the limits of the maximum levels of imports established in section 2 of Proclamation 3279:

- (1) modify any allocation made to any person under this regulation;
- (2) grant allocations of crude oil and unfinished oils in special circumstances to persons with importing histories who do not qualify for allocations under this regulation; and
- (3) review the revocation or suspension of any allocation or license.

The decisions of the Appeals Board on petitions and appeals shall be final.

(c) The Appeals Board may adopt, promulgate, and publish such rules of procedure as it deems necessary for the conduct of its hearings.

#### Sec. 22 Definitions.

As used in this regulation:

(a) "person" includes an individual, a corporation, firm or other business organization or legal entity, and an agency of a



(6) lubricating oil - a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces;

(7) residual fuel oil - a topped crude oil or viscous residuum which, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification Mil-F-859 for Navy Special Fuel Oil and other more viscous fuel oil, such as No. 5 or Bunker C;

(8) asphalt - a solid or semi-solid cementitious material which gradually liquefies when heated, in which the predominating constituents are bitumens, and which is obtained in refining crude oil.

(f) "unfinished oils" means one or more of the petroleum oils listed in paragraph (e) of this section, or a mixture or combination of such oils, which are to be further processed other than by blending by mechanical means;

(g) "Administrator" means Administrator, Oil Import Administration, Department of the Interior, or his duly authorized representative;

(h) The words, "importation," "importing," "import," "imports," and "imported," include both entry for consumption and withdrawal from warehouse for consumption;

(i) "refinery inputs" include all crude oil, imported unfinished oils, natural gasoline mixed in crude oil, and plant and field condensates mixed in crude oil, which are further processed, other than by blending by mechanical means, but do not include unfinished oils which have not been imported;

(j) "refinery capacity" means a plant which, by further processing crude oil or unfinished oils, other than by blending by mechanical means, manufactures finished petroleum products.

sgd - Elmer F. Bennett

Acting Secretary of the Interior



state, territorial, or local government, but does not include a department, establishment, or agency of the United States;

(b) "Districts I-IV" means the District of Columbia and all of the States of the United States except those States within District V;

(c) "District V" means the States of Arizona, Nevada, California, Oregon, Washington, Alaska, and the Territory of Hawaii;

(d) "crude oil" means crude petroleum as it is produced at the wellhead;

(e) "finished products" means any one or more of the following petroleum oils, or a mixture or combination of such oils, which are to be used without further processing except blending by mechanical means:

(1) liquefied gases - hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures;

(2) gasoline - a refined petroleum distillate which, by its composition, is suitable for use as a carburant in internal combustion engines;

(3) jet fuel - a refined petroleum distillate used to fuel jet propulsion engines;

(4) naphtha - a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes;

(5) fuel oil - a liquid or liquefiable petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuel oils, gas oil, diesel fuel, topped crude oil, residues;















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